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128
June 14
REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF OREGON

ROBERT G. MORROW

REPORTER

VOLUME 40

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OF THE
SUPREME COURT

DURING THE TIME OF THESE DECISIONS.

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CASES DECIDED
IN THE
SUPREME COURT
OF
OREGON.

Decided 16 August, 1901.

WINDLE v. HUGHES.

[65 Pac. 1058.]

MORTGAGES—ASSUMPTION BY GRANTEE—DEFICIENCY JUDGMENT.

1. Where a grantee accepts a deed containing a provision that the land is incumbered by a specified mortgage, which is to be paid by him as a part of the price, he thereby assumes the debt, and a personal judgment for the deficiency may be entered against him on foreclosure.

ASSIGNABLE COVENANT.

2. Where a mortgagor covenants to pay all taxes on the mortgage and the property, and that if not paid before they are delinquent the mortgagee may pay, and the amounts so paid shall be added to the debt and be secured by the mortgage, such covenant is binding on a grantee of the premises who assumes the payment of the mortgage, and also inures to the benefit of an assignee of the mortgage.

REPEALING STATUTE—EFFECT BY RELATION.

3. Ordinarily, the repeal of a statute does not affect proceedings that have been initiated under it, as they will, under the doctrine of relation, be considered as having been done at the time they were commenced; thus, the repeal of the mortgage tax law did not affect the duty to pay or right to collect taxes which had been levied prior to the repeal: *Smith v. Kelly*, 24 Or. 464, applied.

From Multnomah: JOHN B. CLELAND, Judge.

Suit by James C. Windle against Ellis G. Hughes and others to foreclose a mortgage. Hughes alone defended, and appeals from a decree and personal judgment against him.

AFFIRMED.

For appellant there was a brief over the names of *R. & E. B. Williams* and *Ellis G. Hughes*, with an oral argument by *Mr. Hughes in pro. per.*

For respondent there was a brief and an oral argument by *Mr. William Y. Masters.*

MR. JUSTICE WOLVERTON delivered the opinion.

This is a suit to foreclose a mortgage executed March 8, 1892, by H. J. Hefty and Agatha, his wife, to Emma Jones, to secure payment of a promissory note given at the same time by Hefty to Jones for \$4,000. The mortgage contains a covenant that the mortgagors will pay all taxes and assessments that may be lawfully assessed or levied against the mortgagee or assigns on account of the said note or mortgage, and all taxes and assessments that may be lawfully levied upon or against said land, when the same become due and payable, and not later than ten days before the same become delinquent, and that, in case the mortgagors shall fail or neglect to pay said taxes and assessments as thus provided, the mortgagee may pay the same; and the mortgagors agree to repay the amount so paid at the same time and with the first installment of the interest falling due thereafter, and that the same shall become a part of the debt secured by the mortgage, and a lien upon the land. Hefty and wife made a conveyance of the land to the defendant Ellis G. Hughes on June 7, 1895, containing the following covenant or provision, viz.: "Said property is to be free of incumbrance, save and except a certain mortgage for four thousand dollars (\$4,000) made by the parties of the first part hereto on the 8th day of March, 1892, in favor of Emma Jones, * * * and which remains a lien on the aforesaid property, and is to be paid by the party of the second part, with all interest accruing thereon from and after the 8th day of June, 1895, and as part of the purchase price of the property hereby conveyed." On September following, Emma Jones assigned the note and mortgage to the plaintiff. A decree was rendered foreclosing the mortgage.

and against Mr. Hughes personally for the balance due on the note, and attorney's fees, and for certain taxes, namely, \$84.45, state, county, and school taxes, for Multnomah County, upon the mortgage, for the year 1892; \$41.05, state, county, road, Port of Portland and school district taxes for the year 1897, and the City of Portland taxes for the year 1898, upon the property described in the mortgage, which were due and unpaid on April 28, 1899, at which date plaintiff paid them; and for the further sum of \$48.95, state, county, and road taxes for Port of Portland, and school district taxes for the year 1896, and the City of Portland taxes for the year 1897, upon the property, which were delinquent and unpaid on December 31, 1898, and by plaintiff paid and discharged on that date. From this decree, Hughes appeals.

The grounds of error relied on by appellant for a reversal of the decree are as follows: (1) That respondent is not entitled to recover a personal judgment against him for anything; (2) that he is not entitled to recover, either from him or out of the mortgaged property, the sum of \$84.45, claimed to have been paid by him on the twenty-eighth day of April, 1899, as for a tax on the mortgage for the year 1892; (3) that he is not entitled to recover, either from him or out of the mortgaged premises, the sums claimed to have been paid by him for the taxes on the land. We will discuss these in their order.

1. Appellant insists that the covenant or stipulation in the deed or conveyance by Hefty and wife to him of the premises is not sufficient to render him personally liable to the mortgagee or her assignee. We are of the opinion, however, that it is ample for the purpose. Briefly, the covenant or provision is that the mortgage remains a lien on the property, and "is to be paid by the party of the second part (Hughes), with all interest accruing thereon from and after the eighth day of June, 1895, and as part of the purchase price of the property hereby conveyed." In *Sparkman v. Gove*, 44 N. J. Law, 252, a deed was given, "subject to certain mortgages now liens," etc., "one to secure," etc., "the other to secure the payment of the sum of \$3,000, with interest, and which

mortgages are assumed by the party of the second part;” and it was held to warrant a personal judgment against the grantee. So, in *Burr v. Beers*, 24 N. Y. 178 (80 Am. Dec. 327), the deed was “subject to two mortgages (describing them), which mortgages are deemed and taken as a part of the consideration of this conveyance, and which the party of the second part hereby assumes to pay;” and this was held to create a personal obligation, which the mortgagee could enforce against the grantee. And, again, in *Schmucker v. Sibert*, 18 Kan. 104, 111 (26 Am. Rep. 765, 769), Mr. Justice BREWER says “that the acceptance of a deed which in terms provides that the grantee shall pay off a certain incumbrance is an undertaking by the grantee to pay the incumbrance, and an undertaking which may be appropriated by the holder of the incumbrance, and upon which he may maintain an action.” And in *Young Men’s Association v. Croft*, 34 Or. 106, 111 (75 Am. St. Rep. 568, 55 Pac. 439, 440), Mr. Justice MOORE, delivering the opinion, says that “where the grantor is in equity bound to pay the debt as his own, the covenant of his grantee to discharge the obligation constitutes a promise made for the benefit of the holder of the mortgage, which he may enforce, although the primary object of the grantor in exacting the covenant was to protect himself against his personal liability for the debt, which was a charge upon the mortgaged premises.” Other cases to the same purpose are *Locke v. Homer*, 131 Mass. 93 (41 Am. Rep. 199); *Campbell v. Shrum*, 3 Watts, 60; *Crawford v. Edwards*, 33 Mich. 354; *State ex rel. v. Davis*, 96 Ind. 539; *Thompson v. Dearborn*, 107 Ill. 87.

The cases cited by the appellant are distinguishable from these, as they are based upon conveyances containing no stipulation requiring the grantee to pay the debt: *Belmont v. Coman*, 22 N. Y. 438 (78 Am. Dec. 213); *Equitable Life Assur. Soc. v. Bostwick*, 100 N. Y. 628 (3 N. E. 784); *Fiske v. Tolman*, 124 Mass. 254 (26 Am. Rep. 659). The conditions are present in the case at bar for imposing a personal liability upon the appellant. There was an intent by the mortgagors to secure a benefit to the mortgagee, between whom there was

a privity existing, and an obligation from the former to the latter which gave him a legal claim to the benefit [*Brower Lumber Co. v. Miller*, 28 Or. 565 (43 Pac. 659, 52 Am. St. Rep. 807); *Vrooman v. Turner*, 69 N. Y. 280 (25 Am. Rep. 195)], which, together with the undertaking that the mortgage is to be paid by the grantee, leaves no doubt touching his personal liability. The acceptance of the deed alone, containing the provision, without else, is all that is necessary to impose the obligation: 1 Jones, Mortgages (4 ed.), § 752; *Sparkman v. Gove*, 44 N. J. Law, 252. So that the personal decree, so far as it relates to the liability to pay the principal and interest thereon, was properly rendered against the appellant.

2. The second objection relates to the taxes levied against the mortgage, and is based upon the idea that the covenants therein concerning the taxes are personal between the mortgagors and the mortgagee, and that the appellant has not by reason of the stipulation in the deed obligated himself to pay them, even if the provision is broad enough to hold him to a personal liability as to the debt, with interest; and it is further insisted that the repeal of the mortgage tax law rendered the tax uncollectible and nugatory. The covenant of the mortgagors to pay the taxes stands upon a like footing as their covenant to pay the amount of the note and interest, and inures to the benefit of an assignee of the mortgagee, as well as the latter. The purpose of the mortgage was to secure the payment of the taxes, as well as the note; and if, under its conditions, the mortgagee was required to pay them to prevent their becoming a lien upon the land, they became a part of the mortgage debt, to be discharged like the debt itself. With an assignment, therefore, of the mortgage, the assignee took the place of the mortgagee, and was entitled to enforce a like performance of the covenants on the part of mortgagors as the mortgagee herself. In this view, when the appellant assumed to pay the mortgage he undertook to discharge the conditions thereof relative to the payment of the taxes and assessments, also. The reference in the provision in question in the deed to accruing interest from June 8, 1895, was made, no doubt, as a

measure of the consideration for the conveyance, but does not otherwise limit the scope of the grantee's undertaking.

3. Nor does the repeal of the mortgage tax law affect the matter, as such repeal did not terminate the right to collect the taxes then accrued thereunder: *Smith v. Kelly*, 24 Or. 464 (33 Pac. 642). What has been said disposes of the third objection, also; and, finding no error in the record, the decree of the court below will be affirmed. **AFFIRMED.**

Argued 30 September; decided 14 October, 1901.

HECKER v. OREGON RAILROAD COMPANY.

[66 Pac. 270; 23 Am. & Eng. R. R. Cas. (N. S.) 33.]

RAILROADS—GRADE CROSSING—QUESTION FOR JURY.

1. Plaintiff and another, familiar with a railroad crossing, attempted to cross the track with a team and wagon, and were struck by one of defendant's trains. The highway, before crossing the track, ran parallel with and two hundred to three hundred feet from it for half a mile, the view being obscured at intervals. Some forty feet from the crossing the track could not be seen for several hundred feet eastwardly, the direction from which the men were approaching; but from that point the view from the road was obscured until within nineteen feet from the crossing. On approaching the crossing, the men slowed the team to a speed of one and one half miles an hour. Plaintiff testified that the wagon did not make noise enough to interfere with hearing; that at an open place, some forty feet from the track, in looking and listening they stopped the horses so that their movements were almost imperceptible; that, there appearing to be no danger from the east, they looked westwardly, and did not notice the train coming from the east in time to avoid a collision. *Held*, in an action for damages, that the question of contributory negligence was for the jury: *Blackburn v. Southern Pac. Co.* 34 Or. 215, distinguished.

RAILROADS—NEGLIGENCE IN MAKE-UP OF TRAIN.

2. It is not negligence *per se* to operate a train in the country districts with the tender ahead of the engine, but the train must be run with reasonable regard to the rights of travelers on the public highways.

ACCIDENT AT GRADE CROSSING—DUTY TO LOOK FOR TRAIN.

3. An instruction, in an action for injuries received at a crossing, that plaintiff was guilty of contributory negligence if he did not look in each direction at such time and place as would enable him to avoid the approaching train on defendant's track, was properly refused. In this class of cases the jury are ordinarily the judges of whether there was contributory negligence, and the instruction requested would have taken that question from them.

RAILROADS—FAILURE TO OBEY RULES AS NEGLIGENCE.

4. A jury may consider the rules of the railroad company requiring a

bell to be rung for a distance of a quarter of a mile before reaching a crossing in determining whether such precaution was reasonably necessary, and whether a failure to so ring the bell was negligence on the part of the company.

From Wasco: WILLIAM L. BRADSHAW, Judge.

Action for personal injuries by J. J. Hecker against the Oregon Railroad & Navigation Co. From a judgment against it, defendant appeals. AFFIRMED.

For appellant there was a brief over the name of *Cotton, Teal & Minor*, with an oral argument by *Mr. Wirt Minor*.

For respondent there was a brief over the name of *Bennett & Sinnott*, with an oral argument by *Mr. Alfred S. Bennett*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

On June 8, 1900, the plaintiff and one Calbreath were driving in a westerly direction, along a public highway, in a light, wide-tired wagon drawn by two horses. The road runs substantially parallel with, and two hundred or three hundred feet from, a railway track, for perhaps half a mile, the intervening space being partially covered by a growth of pine trees, obstructing the view at intervals. The roads gradually converge, and the wagon road crosses the railway track at grade. The men were both familiar with the crossing, and, as they approached it, slowed down their team to a speed of about a mile or a mile and a half an hour, listening carefully all the time, and looking, as they had opportunity, for a train from the east. The road was soft and sandy, so that the wagon made but little noise,—not enough, according to the plaintiff's testimony, to interfere with the sense of hearing. About thirty-five or forty feet from the crossing they could see the track for several hundred feet east, but from here the view from the road is again obscured until within nineteen feet of the crossing. The plaintiff says that at the former place he looked for a train, and, in listening, "so nearly stopped that you could not tell we were moving." After thus satisfying themselves that there was no danger from the east, they turned their

attention to the track on the west, which was first visible at the forty-foot point, and did not hear or notice a train coming from the opposite direction until too late to avoid the collision which caused the injuries for which plaintiff seeks to recover damages. At the trial, when plaintiff rested, defendant moved for a nonsuit, which motion was overruled, and a verdict returned in plaintiff's favor. From the judgment thereon defendant appeals, assigning as error the overruling of its motion and the giving and refusal by the trial court of certain instructions.

1. The principal question on this appeal is whether under the circumstances the plaintiff was guilty of such contributory negligence as to bar his recovery. Ordinarily, in actions of this kind, the question of contributory negligence is for the jury. The cases where nonsuits are allowed are exceptions, and confined to those where the uncontradicted facts show the omission of acts which the law adjudges to be negligence. Where the facts are undisputed, and are such that all reasonable men must draw the same conclusion from them, the court may decide the question as one of law; but where there is a controversy as to the facts, or where reasonable men may fairly differ as to whether there was negligence, the determination of the matter is for the jury. The duty of a traveler on a public road, approaching a railway crossing at grade, has been so often declared by the courts and text writers that it needs no further elaboration. He is required to exercise due and ordinary care to avoid being injured by a passing train. Formerly, the question of what was such ordinary care went to the jury. The law now, however, has gone beyond this, and requires a traveler about to cross a railway track to look and listen for an approaching train, and a failure in that respect, without reasonable excuse, is considered negligence as a matter of law: *Durbin v. Oregon Ry. & Nav. Co.* 17 Or. 5 (17 Pac. 5, 11 Am. St. Rep. 778);* *McBride v. Northern Pac. R. Co.* 9 Or. 64 (23 Pac. 814). It is therefore generally con-

*See note to this case: Negligence as a Question of Law; Duty to Look and Listen at Railway Crossings.

sidered improper to leave to the jury the question whether a prudent man would look and listen before crossing a railway track, it being deemed the duty of the court to declare that failure to do so is negligence. To this extent the *quantum* of care required is prescribed by law. In some jurisdictions the courts have gone further, and held that he must not only look and listen before attempting to cross the track, but must stop for that purpose. But under the great weight of authority, while the failure to stop may be evidence of negligence, and sometimes so conclusive as to justify a nonsuit, it is not negligence *per se*, and is not required of the traveler as a matter of law: 2 Woods, Railroads (Minor's ed.), 1534; 3 Elliott, Railroads, § 1167; Beach, Contrib. Neg. (3 ed.) § 182; 7 Am. & Eng. Ency. Law (2 ed.), 430; *Judson v. Central Vt. R. Co.* 158 N. Y. 597 (53 N. E. 514); *Lewis v. Long Island R. Co.* 162 N. Y. 52 (56 N. E. 548).

Although it is negligence for a traveler not to look and listen for approaching trains before attempting to cross a railway track, the law does not undertake to determine whether he shall do so at any particular place or given distance from the crossing. It is only required that he shall look and listen at the time and place necessary in the exercise of ordinary care; and this is generally a question for the jury, under all the circumstances of the particular case; for, as said by the Supreme Court of New York: "If, in case of an accident at a crossing, it appears that the person injured did look for an approaching train, it would not necessarily follow as a rule of law that he was remediless because he did not look at the precise place and time when and where looking would have been of the most advantage. Many circumstances might be shown which could properly be considered by the jury in determining whether he exercised due and reasonable care in making his observation": *Rodrian v. New York, N. H. etc. R. Co.* 125 N. Y. 526, 529 (26 N. E. 741). See, also *Moore v. Chicago, St. P. & K. C. Ry. Co.* 102 Iowa, 595 (71 N. W. 569); *Cleveland, etc. Ry. Co. v. Harrington*, 131 Ind. 426 (30 N. E. 37); *Smith v. Baltimore & O. R. Co.* 158 Pa. St. 82 (27

Atl. 847); *Ely v. Railway Co.* 158 Pa. St. 233 (27 Atl. 970). Under these rules, which are substantially elementary, we think that the motion for a nonsuit was properly denied. There was no such failure of duty on the part of the plaintiff as the law adjudges negligence *per se*, and therefore the question of contributory negligence was one of fact, and for the jury. The evidence shows that he was looking and listening for approaching trains. Whether he did so at the proper time and place, and whether, in order to do so effectively, he should have stopped, were all questions for the jury, and properly submitted to them. "All that this court can do is to lay down the general rules, and to say that, where the facts are uncontested, or the inference of negligence the only one that can be drawn, the court must pronounce the result as a matter of law; but where the facts are in dispute, or the inference from them open to debate, they must go to the jury": *Ely v. Railway Co.* 158 Pa. St. 233, 236 (27 Atl. 970).

At the argument considerable reliance was placed upon the case of *Blackburn v. Southern Pac. Co.* 34 Or. 215 (55 Pac. 225), but it differs in very many respects from the case at bar, and is not an authority here. There a traveler on a hard, dry, and somewhat rocky street, where the view was entirely obstructed, attempted to cross a railway track at a blind and dangerous crossing, without stopping the noise made by his wagon so that he could effectively listen for an approaching train. Here the plaintiff was not compelled to rely alone upon his sense of hearing. The crossing was not entirely obstructed, but before reaching it he could see the track at intervals in the direction from which the train approached. The road was sandy and soft, and the wagon on which he was riding made but little, if any, noise. Under these facts reasonable minds might differ as to whether he exercised due care. The court, therefore, could not determine the question, and properly referred it to the jury. What was said in the *Blackburn Case* about the law prescribing the *quantum* of care required of a traveler at a railway crossing was not intended, as the context shows, to mean that the courts should

decide the question of contributory negligence in all cases, but that the jury can no longer determine, from their own conceptions alone, whether the traveler has acted as a careful and prudent man, since the law prescribes certain duties, such as looking and listening, a failure to observe which constitutes negligence *per se*.

2. The train which injured the plaintiff consisted of an engine and caboose, and, as the evidence tended to show, was backing down the track at a speed of forty or fifty miles an hour, without ringing a bell or giving any other signal of its approach to the crossing. The defendant requested the court to charge the jury that it was not negligence to operate its train with the tender ahead of the locomotive, which instruction the court gave, with the qualification, "If such train or cars are operated prudently, and with reasonable regard to the rights of travelers." In our opinion, this was a proper modification of the charge as requested, and the assignment of error based thereon is not well taken.

3. The defendant also requested the court to charge the jury that "it was the duty of the plaintiff, in approaching the track of the defendant, before attempting to cross the same, carefully to look in each direction, in coming to the track, for an approaching train; and if you find from the evidence that plaintiff, before he entered upon the railroad track of the defendant, did not look in each direction for a train approaching the crossing, *or did not look in each direction at such time and place as would enable him to avoid such approaching train on the railroad track of the defendant*, but entered upon the track, and was struck by a locomotive or car or tender being operated thereon, I charge you that this was contributory negligence on the part of the plaintiff, and you shall return a verdict for the defendant." The court gave the instruction, with the exception of the part italicized, and for a refusal to give the part excepted error is assigned. The instruction, as requested, practically amounted to a direction to find for the defendant. It stated, in effect, that, if plaintiff did not look in each direction for an approaching train, at such

a time and place as would enable him to avoid such train, he was guilty of contributory negligence, and could not recover. Now, if he had so looked, he would necessarily have seen the train, and therefore been guilty of contributory negligence in attempting to cross the track in front of it; so that, under the instruction requested, the plaintiff could not have recovered, because, if he had not looked at the time and place specified, he would have been guilty of negligence, and, if he had, he certainly would have been so guilty. It is probable that he did not look in the direction from which the train came, at a place where he could have seen it, in time to avoid the casualty. Whether he was guilty of negligence in not so doing was for the jury, and the court would not have been justified, as a matter of law, in withdrawing it from them.

The defendant also complains of the refusal of the court to instruct the jury that, if there was a space on the public road, before the crossing was reached, from which the plaintiff could have seen the train approaching, it was his duty to have looked from that place, and, if he failed to do so, he could not recover. But, as we have already said, the question as to whether he was negligent in not looking for an approaching train from the east at any given place was a question of fact for the jury. The evidence shows that he was proceeding cautiously, looking and listening for a train. He was, therefore, not acting recklessly, but with the danger in mind, and with some degree of care and prudence; and whether it was sufficient was for the jury, and not the court.

4. There was no error in instructing the jury that they might consider the rules of the company requiring a bell to be rung for a distance of a quarter of a mile before reaching the crossing in determining whether or not such precaution was reasonably necessary, and a failure to so ring the bell negligence on the part of the company: *Wood v. New York, C. & H. R. R. Co.* 70 N. Y. 195; *Smithson v. Chicago Gt. West. Ry. Co.* 71 Minn. 216 (73 N. W. 853).

The instruction taken from *Haines v. Illinois Cent. R. Co.* 41 Iowa, 227, 231, a portion of which the court refused to

give, was one of a series of instructions approved as a whole by that court; and, besides, as we read it, the portion eliminated by the trial court would make the plaintiff guilty of contributory negligence *per se* if he did not stop his team to listen for an approaching train; and such is not the law, as we understand it.

There are several other assignments of error, but they are all substantially covered by what has already been said, and the judgment is therefore affirmed. AFFIRMED.

Argued 30 September; decided 14 October, 1901.

UNITED STATES v. MCCANN.

[66 Pac. 274.]

REAL PARTY IN INTEREST—TRUSTEE AS PLAINTIFF.

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1. A person to whom a bond is executed conditioned to pay all expenses of performing a certain contract is a trustee of an express trust, within the meaning of Section 29, Hill's Ann. Laws, and is therefore the "real party in interest," as a plaintiff is required to be by Section 27 of Hill's Ann. Laws, and may sue on the bond in his own name, without joining the persons who will ultimately receive the benefit of any recovery: *Heater v. Schneider*, 14 Or. 184, cited.

PROPRIETY OF OPINION EVIDENCE*—DAMAGES.

2. Except where expert testimony is allowable, witnesses must state facts only, it being the province of a jury to draw its own conclusions; thus, in an action for damages, a witness should not be permitted to give his opinion as to the value of the injury suffered: *Burton v. Severance*, 22 Or. 91, followed.

PRESUMPTION OF INJURY FROM ERROR.

3. Where error affirmatively appears, presumably, it was injurious, and the contrary must be shown to prevent reversal.

From Clatsop: THOMAS A. McBRIDE, Judge.

This is an action brought in the name of the United States, for the use and benefit of the Clatsop Mill Company, to recover a balance alleged to be due the mill company for lumber furnished to defendants Bulger & McCann, who, as contractors, did some work for the United States at the buoy

NOTE.—To the same effect, see *Chan Sing v. Portland*, 37 Or. 68.

—REPORTER.

depot near Astoria. The action is upon a bond executed under and in pursuance of the act of congress approved August 13, 1894 (28 Stat. c. 280, p. 278), which provides that "any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required before commencing such work to execute the usual penal bond, with good and sufficient sureties, with the additional obligations that such contractor or contractors shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in such contract; and any person or persons making application therefor, and furnishing affidavit to the department under the direction of which said work is being, or has been, prosecuted, that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, shall be furnished with a certified copy of said contract and bond, upon which said person or persons supplying such labor and materials shall have a right of action, and shall be authorized to bring suit in the name of the United States for his or their use and benefit against said contractor and sureties, and to prosecute the same to final judgment and execution; *provided*, that such action and its prosecution shall involve the United States in no expense." The complaint alleges, in substance, that on the fifth day of September, 1894, the defendants Bulger & McCann entered into a contract with the United States to furnish all the labor and material necessary to do certain work in and about the buoy depot near Astoria, and at the same time, with the defendants Fisher and Fox as sureties, made, executed, and delivered to the plaintiff the bond upon which this action is based, conditioned, among other things, that they would "promptly make payments to all persons supplying them labor and materials in the prosecution of the work;" that between the thirteenth of October, 1894, and the fifth of January, 1895, the Clatsop Mill Company sold and delivered

lumber to Bulger & McCann of the reasonable value of \$671.39 which was used in the performance of their contract, no part of which has been paid, except \$350, leaving a balance of \$321, for which judgment is demanded against the defendants for the use and benefit of the mill company.

The answer admits the execution of the bond and the furnishing of lumber to Bulger & McCann by the mill company, but, as an affirmative defense, avers, in substance, that, prior to entering into the contract with the United States, Bulger & McCann contracted with the mill company to furnish all the lumber necessary therefor on board a staunch and seaworthy scow at its lumber yard in the City of Astoria, as fast as it might be needed, and in time to enable them to complete the contract within two calendar months from September 15, 1894, and that the mill company failed to comply with its agreement, on account of which Bulger & McCann suffered damage, in this: (1) That it failed and neglected to deliver the materials within the time agreed upon, on account of which Bulger & McCann were delayed thirty-three days in the completion of the work, and compelled to and did forfeit to the United States \$330; (2) that it did not deliver the materials on scows as agreed, and Bulger & McCann were compelled to and did pay a steamboat \$78 for carrying a large portion of the lumber; (3) that it delivered a portion of the lumber on a rotten and unseaworthy scow, to the damage of Bulger & McCann in the sum of \$25; and (4) that, by reason of the failure to deliver the lumber in time, Bulger & McCann were greatly hindered and delayed in the completion of the work, and required to employ a large number of extra men, which otherwise they would not have been compelled to do, and were obliged to and did raft and transport lumber by small boats from the mill company's yard to the works, and expend a large amount of time, and employ a large number of boats and laboring men, and otherwise expend large sums of money, aggregating the full sum of \$500, in which sum they were further damaged. A reply was filed, putting in issue the new matter alleged in the answer, and the trial resulted in a

verdict and judgment in favor of the defendants, from which the plaintiff appeals, assigning error in the admission of testimony and in instructions to the jury. REVERSED.

For appellant there was a brief and an oral argument by *Messrs. John H. and Andrew M. Smith.*

For respondent there was a brief over the name of *Fulton Bros.*, with an oral argument by *Mr. Geo. Clyde Fulton.*

MR. CHIEF JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

1. It is insisted by the defendants that the complaint does not state a cause of action, because it shows on its face that the United States has no interest in the subject-matter of the litigation, or in the amount sought to be recovered, and that the action should have been brought in the name of and by the Clatsop Mill Company, the real party in interest. The statute provides that "every action shall be prosecuted in the name of the real party in interest," except that "an executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted": Hill's Ann. Laws, §§ 27, 29. And it is declared that "a person with whom, or in whose name a contract is made for the benefit of another, is a trustee of an express trust, within the meaning of this section": Hill's Ann. Laws, § 29. Now, the complaint, and the bond which is made a part of it, show on their face that the contract between the defendants and the United States was made for the benefit of "all persons supplying" Bulger & McCann with "labor and materials in the prosecution of the work," and therefore, under the statute, the United States is a trustee of an express trust, and an action on the bond may be maintained in its name, without joining with it the person for whose benefit the action is prosecuted. Mr. Pomeroy says: "Various kinds of bonds and undertakings generally required by statute, and given to some designated

obligee, although showing on the face that they are designed to protect, secure, or indemnify other persons, are also contracts made 'with, or in the name of, one person for the benefit of another;' and although the party immediately interested may, in general, sue in his own name, yet the obligee or person to whom the promise is made may always, unless forbidden by statute, maintain the action, and in some states is the only one who is permitted to do so": Pomeroy, Code Rem. (3 ed.) § 176. And Mr. Hawes says: "A person with whom or in whose name a contract is made for the benefit of another is a trustee of an express trust, and an action upon contract may be maintained in his name alone; but he is not compelled to bring the action. It may be maintained in the name of the *cestui que trust*": Hawes, Parties, § 32.

The New York statute has precisely the same provisions upon this subject as ours. In *Stillwell v. Hurlbert*, 18 N. Y. 374, a deputy sheriff holding an execution took a bond running to his principal, conditioned to indemnify the latter and all persons assisting him in the premises, and it was held that an action would lie in the name of the sheriff for the benefit of the deputy, without any assignment of the cause of action by the latter. HARRIS, J., in speaking for the court, said: "In respect to the deputy who held the execution, and who in fact received the bond, the plaintiff became the trustee of an express trust. The obligation was executed to him for the benefit of his deputy. It is the precise case for which provision is made in the 113th section of the code." Again, in *Considerant v. Brisbane*, 22 N. Y. 389, it was held that the agent of a foreign corporation might maintain an action in his own name upon a subscription note payable to him "as executive agent of the company," although he had no personal interest in the note, on the ground that he was the trustee of an express trust, and as such entitled to bring the action. In *People v. Norton*, 9 N. Y. 176, it was held, before the code of that state was amended so as to include by its terms as a trustee of an express trust a person with whom or in whose

name a contract is made for the benefit of another, that an action was properly brought in the name of the people on a bond given to the "People of the State of New York" for the benefit of those interested in a certain trust estate, the court ruling that the plaintiff was the trustee of an express trust, within the meaning of the statute authorizing an action to be brought by such a trustee in his own name, without joining the party for whose benefit it is prosecuted. See, also, *Hexter v. Schneider*, 14 Or. 184 (12 Pac. 668; *United States v. Henderlong*, (C. C.) 102 Fed. 2; *Weaver v. Trustees*, 28 Ind. 112. We are of the opinion, therefore, that the action in this case was properly brought in the name of the United States, although it is probable that an action might have been maintained in the name of the mill company.

2. This brings us to the consideration of the assignments of error. The bill of exceptions shows that, after the plaintiff had given evidence tending to support the issue on its part, and rested, the defendant McCann offered himself as a witness, and testified that he and his partner, Bulger, entered into a contract with the United States to construct the public improvement mentioned in the complaint, and that the mill company agreed to furnish the lumber necessary therefor so as to enable them to complete the same within the time stipulated in their contract, but it had failed and neglected to do so; whereupon his counsel had propounded the following question to him: "I will ask you how much you were damaged by the failure of this mill company to deliver this lumber?" to which the plaintiff objected on the ground that it was incompetent, and called for the opinion of the witness. The court overruled the objection, and plaintiff's counsel excepted. The witness answered: "Well, I put my damages at \$1,000." Thereupon he was asked by his counsel: "Not what you put it at, but what were your damages actually? A. I put it at that much. Q. How much? A. \$1,000. Q. How much did the United States retain from you on account of the delay? A. \$330. Q. I will ask you how much money it would have cost you, and you would have been required to have expended, in com-

pleting this work, had the lumber been delivered to you on time, so you would not have been delayed in waiting for it?" Objection was made to this question on the ground that it was incompetent, and called for the opinion of the witness, which objection was overruled, and the witness answered, "I estimated \$1,150." "Q. How much did it cost you on account of delays you suffered because lumber wasn't delivered on time?" A similar objection was made and ruling had on this question, and the witness answered, "About \$600 extra." Counsel for the plaintiff not only objected to the admission of this testimony, but moved to strike it out; but the court overruled the motion, which ruling is also assigned as error.

It is an elementary rule of evidence that, except in cases where expert opinions or testimony is competent, a witness must state facts, and not draw conclusions from them, or give opinions. In actions of this character, therefore, while a witness may state the facts upon which the damage is predicated, he can not give his opinion concerning the amount of damages resulting from any given act, because it is the exclusive province of the jury to assess damages, under the rules of law declared by the court. This question arose in *Burton v. Severance*, 22 Or. 91 (29 Pac. 200), and that case is decisive here. It was an action to recover damages alleged to have been suffered by the plaintiff on account of the obstruction by the defendant to the navigation of a stream in Tillamook County. Upon the trial, the plaintiff was permitted, over defendant's objection and exception, to answer the question: "How much were you damaged by reason of not being able to transport your hay by scows, and having to do it in the way you did?" After an examination of the authorities, the ruling was held to be error; LORD, J., saying: "It is clear the evidence was improperly admitted, for, as DARGAN, C. J., said: 'I have not been able to find any case that holds the opinions of witnesses as to the *quantum* of damages resulting from any act competent proof'; *Montgomery & W. P. R. Co. v. Varner*, 13 Ala. 185, 187."

3. It is urged that in this case the error complained of was

harmless; but, where error is shown by the record, there is no presumption that it was rendered harmless or obviated during the trial, unless it so affirmatively appears: *Du Bois v. Perkins*, 21 Or. 189 (27 Pac. 1044).

The other assignments of error are based upon some remarks of the trial judge during the progress of the trial, and on one clause of the instructions which would seem to authorize the jury to take into consideration items of special damage without the same having been specified. But, as these questions may not arise on another trial, it is not necessary to consider them at this time.

Because of the admission of improper evidence, the judgment must be reversed, and a new trial ordered. REVERSED.

Argued 30 September; decided 14 October, 1901.

TITLE TRUST COMPANY v. AYLSWORTH.

[66 Pac. 276.]

TAXATION—VALIDITY OF LUMP ASSESSMENT.

1. Under Hill's Ann. Laws, § 2770, providing that the assessor, in making up the tax roll, shall place in separate columns the names of persons taxable, a description of each tract to be taxed, the number of acres, and the full cash value of each tract, an assessment including land of another with that of the one sought to be charged, is absolutely void and of no effect for any purpose, even though the lands are assessed at an equal value per acre: *Strode v. Washer*, 17 Or. 50, applied.

TENDER OF PENALTY—VOID ASSESSMENT.

2. Where an assessment of property for taxation is entirely void the owner is not obliged to tender any sum for the benefit of the holder of a tax title based on such assessment, before being heard to contest such title, as required by Section 2823 of Hill's Ann. Laws: *Jory v. Palace Dry Goods Co.* 30 Or. 196, applied.

REMOVING CLOUD—TENDER OF TAX.

3. Where an assessment of land sold for taxes is void, and the certificates of sale are apparently valid on their face, equity will not require the render of any taxes by plaintiff as a condition precedent to a suit to vacate the tax certificates as a cloud on the title.

From Multnomah: JOHN B. CLELAND, Judge.

Suit by the Title Guarantee & Trust Company against Caleb A. Aylsworth to remove an alleged cloud from the title

to certain property and to quiet plaintiff's title thereto. From a decree dismissing the suit plaintiff appeals. REVERSED.

For appellant there was a brief over the name of *Snow & McCamant*, with an oral argument by *Mr. Wallace McCamant*.

For respondent there was a brief and an oral argument by *Mr. Henry H. Northup*.

MR. JUSTICE WOLVERTON delivered the opinion.

Plaintiff brings this suit to remove a cloud from its title to a certain tract or parcel of land. The complaint alleges that on May 17, 1897, Lewis Rosenthal was the owner of said tract, at which time he died, leaving a will, whereby he devised one half thereof to his wife, Caroline, and the other half to his descendants, who held the title in fee until May 10, 1900, when the plaintiff acquired it; that in March, 1898, all but five acres of plaintiff's land, as described in the complaint, together with a tract of five acres, the sole property of D. V. Rosenthal, a strip of land one hundred feet wide, extending through plaintiff's tract, upon which the Oregon Railroad & Navigation Company operated its railroad, and of which it was the owner in fee, and another strip, fourteen and five tenths feet in width, extending across a portion of said tract, previously dedicated for street purposes, were assessed under a common description one half to "Lewis" Rosenthal and one half to the devisees other than Caroline at the sum of \$4,600; that such further proceedings were had on such assessment that a warrant was issued to the sheriff, by virtue whereof he sold the land so assessed on the sixteenth day of December, 1899, to the defendant, for \$99.15, and thereupon issued to him a certificate of sale, which is one of the papers complained of as clouding plaintiff's title. For a second cause of suit similar facts are alleged with reference to an assessment made in March, 1899, except that it appears that the Oregon Railroad & Navigation Company's right of way was excepted from the description employed by the assessor. The sale under this

assessment is alleged to have taken place December 14, 1900, at which time the defendant became the purchaser for \$82.59, and it is further alleged that on December 1 the plaintiff filed with the board of county commissioners of Multnomah County a statement of the manner of the attempted assessment of said lands, and tendered a stated sum of money in satisfaction of all tax claims against said property; that subsequent to the fourteenth day of December, 1900, the said board acted favorably thereon, and plaintiff paid and the board accepted said stated sum in full satisfaction of all taxes assessed against said land, and that all tax claims against plaintiff were thereby released and discharged. The defendant interposed a plea in abatement in effect that forty-one acres claimed by plaintiff in fee are included in the tract alleged to have been assessed to it; that the lands upon which the assessments were made were listed as acreage lands, and valued at an equal sum per acre, and that defendant is entitled to have forty-one-fifty-one and six tenths of the sum bid by him at such sales repaid to him, together with twenty per cent thereof, by virtue of the statute in such cases made and provided, and that he should not be required to make further answer until such sums were paid or tendered. To this plea a demurrer was filed on the ground that it did not state facts sufficient to constitute a defense, or to require an abatement of the suit, which, being overruled, the court rendered a decree dismissing the suit, and the plaintiff appeals.

The appellant insists that both the assessments are illegal and void for two reasons: (1) They were not made in the name of the owners; and (2) the land, together with other realty, not the property of plaintiff, was embraced in a common description, and all assessed at a lump sum, and, as it pertains to the 1899 assessment, that the plaintiff has settled with the county for all taxes lawfully assessable against said land. In the view we have taken of the controversy, it will be necessary at this time to consider only the second ground of error. By the plea in abatement it is admitted that the plaintiff's predecessors were assessed with fifty-one and six

tenths acres of land, whereas they should have been assessed with forty-one acres only, and that all the land was comprised within a single description. They were assessed, therefore, according to this statement, with ten acres that did not belong to them; but it is sought to obviate this objection by showing that the property was assessed as acreage lands, and of equal value per acre, by reason whereof the defendant argues that it is competent for the court to abate all but forty-one-fifty-one and six tenths, and require the payment or tender of the taxes assessable on the forty-one acres, together with the statutory penalty prescribed where the tax has become delinquent, as a condition to bringing the suit. That the assessment was not made in obedience to statutory requirements there can be no question, and it is not contended that it was. But it is urged that the defect may be characterized as an irregularity merely, which may be conceded to be such as would render a tax deed illegal and invalid for the purpose of passing title, yet that it does not extend so far as to effect the assessment fundamentally, and thereby render it absolutely void, as if none had been made; and the case is rested mainly upon this distinction.

1. In *Strode v. Washer*, 17 Or. 50 (16 Pac. 926), the court had under consideration a similar assessment, where the realty sought to be charged was embraced by the description employed with realty belonging to another party, and it was said that the attempt "was wholly futile. It did not give the owner an opportunity to pay the tax; did not furnish any basis by which the amount assessed upon the property could be ascertained. Grouping the lots with other lots not belonging to the appellant, and fixing the valuation of the whole in a gross sum was not an assessment." On rehearing the court said: "We are satisfied that the offer made at the trial to show that the lots in question were included with two other lots in the attempted assessment should have been allowed, and, if such proof were made, the assessment should be deemed a nullity;" and such is the settled rule elsewhere: *Howe v. People*, 86 Ill. 288; *Crane v. City of Janesville*, 20 Wis. 305; *Hamilton v. City of Fond du Lac*, 25 Wis. 490.

The reason assigned, and upon which the rule is based, is cogent, and affects the assessment fundamentally. A person so assessed by a lump sum with land of his own and others, by a common description, has no means of knowing what part of the burden he should bear, and consequently is afforded no opportunity of discharging his property from the lien imposed, and protecting his title, except by payment of a demand, an undefined and undefinable portion of which is neither in equity nor in law a proper charge against him: Cooley, Taxation (2 ed.), 400. The statute requires that the assessor in making up the roll shall put down in separate columns: (1) The names of the taxable persons in the county; (2) a description of each tract or parcel to be taxed, etc.; (3) the number of acres and parts of an acre, as near as the same can be ascertained, unless divided into blocks and lots; and (4) the full cash value of each parcel of land taxed: Hill's Ann. Laws, § 2770. This method prescribes, in effect, what common justice would dictate,—that each person shall be assessed only with the land that belongs to him. The requirement is exclusively for his benefit, and can not be dispensed with. And where the lands of another in any considerable proportion are included, and the whole are valued at a lump sum, the individual sought to be charged is in reality not assessed at all, because no value has been placed upon his land and extended upon the roll, and he cannot contribute his proper share of the public revenue, as he has not been advised by the roll touching the amount required of him. Such an attempted assessment is an absolute nullity. There being no valuation, the roll stands, as to the party thus involved, in an uncompleted state. The assessor has so performed the duties assigned to him as to omit a vital direction of the statute, and it leaves the party unassessed. Nor does it help the situation any to say that the lands comprised by the description were assessed as acreage lands, and at an equal value per acre, because the assessor has omitted to assess and place a value upon the plaintiff's land. The assessor is the only officer vested with authority to fix and place values upon

the roll, and these cannot be changed except by the board of equalization. No other tribunal—not even a court of equity—has any authority in the premises. So it was impossible for the lower court, and is impossible for this court, to say that, if the assessor had placed a separate valuation upon plaintiff's land, as his official duty required, it would have been in the proportion of forty-one-fifty-one and six tenths of the whole amount of land included by the description employed, and to do so would be to fix a value, and thereby complete the assessment, instead of that officer.

2. The defendant invokes the aid of Hill's Ann. Laws, § 2823, which provides that "in any action, suit, or proceeding for the recovery of lands sold for taxes, except in cases where the taxes have been paid, or the land redeemed as provided by law, the defendant or party claiming to be the owner as against the holder of the tax title must, with his answer, tender and pay into court the amount of the taxes for the payment of which the lands were sold, together with interest thereon at twenty per centum per annum from the date of the sale to the date of said tax deed, together with the sheriff's fees for making said certificate and sheriff's deed, and also any taxes the purchaser may have paid on said lands, with interest thereon from date of payment to the date of filing said answer, for the benefit of the holder of said tax deed, his heirs or assigns, in case said tax title should fail in said action, suit, or proceeding," claiming that this is a suit within the meaning of that section, and that plaintiff is required thereby to tender the amount of taxes for which the land was sold, with the twenty per cent. penalty. Aside from the statute, there is no rule in equity, or elsewhere, requiring in any case the payment of a penalty, except it may be in the way of interest, which could not exceed the legal rate; and without its aid it is plain that there could be no requirement of the payment of the penalty prescribed. We have held that in an action at law, where a tax deed passed, that, if the assessment was absolutely void for want of a sufficient description whereby to intelligently point out or designate the property

sought to be charged, no tender of the kind was necessary or required. In such a case the county acquires no interest in the land attempted to be charged with the tax, and it could not, therefore, convey any interest to the purchaser, or endow him with a lien thereon: *Jory v. Palace Dry Goods Co.* 30 Or. 196 (46 Pac. 786). It would seem, therefore, that, the attempted assessment in the case at bar being a nullity, because of a fundamental defect, the statute could not, with any better reason, be invoked here, conceding that this is a suit within the purview: *Barber v. Evans*, 27 Minn. 92 (6 N. W. 445).

3. A further proposition is advanced, however, that the suit cannot be maintained under general equitable principles without first tendering payment of the amount of taxes equitably due from the plaintiff. It is a salutary principle, as stated by Judge COOLEY in *Albany & B. Min. Co. v. Auditor General*, 37 Mich. 391, and quoted with approval by this court in *Welch v. Clatsop County*, 24 Or. 452, 456 (33 Pac. 935), that "equity will not interfere to restrain the collection of public revenue for mere irregularities. Either it should appear that the property is exempt from taxation, or that the levy is without legal power, or that the persons imposing it were unauthorized, or that they have proceeded fraudulently;" and, beyond this, the party seeking the specific relief must also bring himself within one of the required heads of equity jurisdiction,—as of fraud, accident, mistake, cloud upon owner's title, or the prevention of a multiplicity of suits. See, also, *Du Page County v. Jenks*, 65 Ill. 275; *Wabash, St. L. & P. Ry. Co. v. Johnson*, 108 Ill. 11. As respects the latter feature, the plaintiff has brought itself clearly within the requirement. It has shown that the sheriff's certificates are a cloud upon its title. They are apparently valid upon their face, and it requires evidence *aliunde* to disclose their invalidity. So far the equitable jurisdiction has been appropriately invoked. The other condition is also present. There having been no assessment, as has been shown, there was no legal power or authority to levy the tax and impose it upon the

property. The infirmity complained of is more than an irregularity. It goes to the substance of the assessment, and it is impossible for a court of equity to cure it by extending a proper valuation; hence the rule of estoppel, which ordinarily applies where the proceeding is affected by an irregularity only, cannot be called into requisition here, and equitable jurisdiction rightfully attaches to remove the cloud upon plaintiff's title created by the certificates complained of. As sustaining this view, see *Hamilton v. City of Fond du Lac*, 25 Wis. 490; *Crane v. City of Janesville*, 20 Wis. 305; *Power v. Larabee*, 2 N. D. 141, 162 (49 N. W. 724).

It follows that there was error in overruling the demurrer to the plea in abatement and dismissing plaintiff's suit. The decree will therefore be reversed, the demurrer sustained, and the cause remanded for such further proceedings as may seem appropriate.

REVERSED.

Argued 10 October; decided 21 October, 1901.

CREECY v. JOY.

[66 Pac. 295.]

NOTE—PLEADING—BURDEN OF PROOF.

1. An answer in an action on a note, expressly admitting the execution of the note, and pleading payment thereof is a sufficient admission of its execution to dispense with proof thereof.

JOINT NOTE—LIABILITY OF SURVIVOR.

2. An action can be maintained against the survivor of the makers of a joint promissory note without joining the representatives of the deceased maker.

IMMATERIAL VARIANCE BETWEEN PLEADINGS AND PROOFS.

3. There is not a material variance between an allegation of the execution of a joint and several note by certain named persons and proof of the execution of a joint note by said parties and that one of the parties is dead: *Denn v. Peters*, 36 Or. 486, applied.

DEFECTIVE PLEADING—WAIVER OF ANSWERING OVER.*

4. The defect in the complaint in an action on a note is alleging only the conclusion that a certain sum is due, instead of stating when the note matured, is waived by answering over.

From Multnomah: ALFRED F. SEARS, JR., Judge.

Action on a promissory note by A. T. Creecy against R. Z. Joy. From a judgment in favor of defendant, plaintiff appeals. REVERSED.

For appellant there was a brief over the name of *French & Hufford*, with an oral argument by *Mr. W. S. Hufford*.

For respondent there was a brief over the name of *Catlin & Kollock*.

NOTE.—The authorities on the effect of defectively or inaccurately stating a cause of action or defense, when the objection is not made by motion or demurrer before trial, are generally indexed under the headings, Waiver by Pleading Over and Answer by Verdict. As they are but different statements of one legal proposition, the court has often cited authorities under one of these divisions in support of the other, but in this note the Oregon cases are arranged separately.

WAIVER OF DEFECT BY PLEADING OVER.

Bowles v. Doble, 11 Or. 474, 480; *Davis v. Watt*, 12 Or. 425; *Fisk v. Henarie*, 13 Or. 156, 165; *Olds v. Cary*, 13 Or. 362; *Heater v. Schneider*, 14 Or. 184; *Hyland v. Hyland*, 19 Or. 51, 58; *Anderson v. North Pac. Lumber Co.* 21 Or. 281; *Drake v. Sworts*, 24 Or. 198; *Wilson v. Wilson*, 26 Or. 251; *Baker City v. Murphy*, 30 Or. 405; *Fleischner v. Bank of McMinnville*, 36

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42	255

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is an action on a promissory note. The complaint, omitting the formal parts, is as follows: "That on or about the sixteenth day of June, 1893, the above named defendant and one J. M. Joy, for value received, made, executed, and delivered to this plaintiff their certain joint and several promissory note in writing, bearing date June 16, 1893, whereby and wherein the said R. Z. Joy and J. M. Joy jointly and severally promised and agreed to pay to the order of this plaintiff the sum of \$165.50 in United States gold coin, with interest thereon in like gold coin at the rate of eight per cent per annum from date until paid; that it was provided in said note, and made a part thereof, that, in case of suit or action being instituted to collect the said note or any portion thereof, the said R. Z. Joy and J. M. Joy jointly and severally promised and agreed to pay such additional sum as the court might adjudge reasonable as attorney's fees in said suit or action; that some time after the execution and delivery of said note the said J. M. Joy died; that there is now due and owing on the said promissory note from the said defendant, R. Z. Joy, to this plaintiff, the sum of \$165.50 in United States gold coin, with interest thereon in like gold coin at the rate of eight per cent per annum from the sixteenth day of June, 1893, and the same nor no part thereof has been paid; that the sum of \$25 is a reasonable sum to be allowed plaintiff as attorney's fees in this action for the collection of the said note; that the plaintiff

Or. 553; *Chan Sing v. Portland*, 37 Or. 68; *Currey v. Butcher*, 37 Or. 380; *Hughes v. McCullough*, 39 Or. 372.

AIDERS OF DEFECTIVE PLEADING BY VERDICT.

Houghton v. Beck, 9 Or. 325; *Davidson v. Oregon & Cal. R. Co.* 11 Or. 136; *David v. Waters*, 11 Or. 448; *Specht v. Allen*, 12 Or. 117; *Atkin v. Coolidge*, 12 Or. 244; *Weiner v. Lee Shing*, 12 Or. 276; *Andros v. Childers*, 14 Or. 447; *Willer v. Oregon Ry. & Nav. Co.* 15 Or. 153; *McKay v. Musgrove*, 15 Or. 162; *Bingham v. Kern*, 18 Or. 199; *Gschwander v. Cort*, 19 Or. 513; *Müller v. Hirschberg*, 27 Or. 522; *Bennett v. Minott*, 28 Or. 339; *Nicolaï v. Krimbel*, 29 Or. 76; *Booth v. Moody*, 30 Or. 222; *Balfour v. Day*, 32 Or. 503; *Hargett v. Beardsley*, 33 Or. at p. 307; *Foste v. Standard Ins. Co.* 34 Or. 125; *Sayre v. Mohney*, 35 Or. 141 (56 Pac. 526); *Savage v. Savage*, 36 Or. 268; *Chan Sing v. Portland*, 37 Or. 68; *Roseburg Ry. Co. v. Nosler*, 37 Or. 209; *Currey v. Butcher*, 37 Or. 380 (61 Pac. 631). —REPORTER.

is the owner and holder of the said promissory note." The answer expressly admits the execution and delivery of the note in manner and form as alleged in the complaint, but denies that the makers "jointly and severally" promised to pay such additional sum as the court might adjudge reasonable as attorney's fees, or that there is "now due and owing" on such note from the defendant to the plaintiff the sum of \$165.50, or any other sum, and denies that \$25, or any other sum, is a reasonable attorney's fee. For a further and separate defense it is alleged that on the twenty-second of December, 1893, the defendant paid plaintiff the sum of \$400 in full payment and satisfaction of all moneys and accounts at that time due and owing him. The reply put in issue the material allegations of the answer. Upon the trial the plaintiff, after giving evidence tending to prove the reasonable value of the attorney's fee for prosecuting the action, rested, when the defendant gave evidence tending to show that the note in suit had been settled in December, 1893, in a land trade with plaintiff. Plaintiff thereupon testified in rebuttal, without objection, that on June 16, 1893, the defendant and his father executed the promissory note sued on, and that it was not included in or made a part of the land transaction, nor had any part of it been paid, and it was due one day after date. After both parties had rested the defendant moved for a nonsuit on the ground that the plaintiff had failed to give any evidence tending to show when the note became due and payable. While this motion was pending and undisposed of the plaintiff offered in evidence a note which he claimed to be the one described in the complaint, and which conformed in all particulars to the allegations, except that it was a joint, and not a joint and several, note, and was due one day after date. Objection was made to its introduction, during the consideration of which the plaintiff asked permission to amend his complaint to conform to the proof by alleging that the note sued on was joint, and due one day after date. The court admitted the note in evidence, but refused to permit the

amendment, and subsequently granted the motion for a nonsuit, and plaintiff appeals.

1. The cause of action alleged in the complaint was, in our opinion, admitted by the answer, and no proof on the part of the plaintiff was necessary, except on the question of the attorney's fee. The answer expressly admits the execution and delivery of the note as alleged; and the denial that there was "due and owing" thereon the sum of \$165.50, or any other sum, was not, in view of the affirmative allegations of the answer, a denial that the note had matured, but, rather a denial that there was anything owing thereon, for the reason that it had been paid. The only issue in the case, as we construe the pleadings, was made by the allegation in the answer of payment. The burden of proof being thus transferred to the defendant, a motion for a nonsuit could not properly be sustained because of a failure of proof on the part of the plaintiff: *Rader v. McElvane*, 21 Or. 56 (27 Pac. 97).

2. But if we are mistaken in our construction of the pleadings, and the question as to whether the note sued on was due at the commencement of the action was an issue, the note itself, as well as the oral testimony of the plaintiff, given without objection, was ample proof on that point. It is true, the note offered and admitted was joint, while the complaint alleges the one sued on to be joint and several, but it is averred and admitted that after its execution one of the makers died. In such case an action can be maintained against the survivor alone, without joining the personal representatives of the deceased maker: *Pomeroy*, Code Rem. (3 ed.) § 280; so that it can make no difference, so far as the defendant's liability to the plaintiff is concerned, whether the note was joint or joint and several.

3. The variance in this regard could not, therefore, have misled him to his prejudice, and, being immaterial, should be disregarded: *Hill's Ann. Laws*, § 96; *Dodd v. Denny*, 6 Or. 157; *Stokes v. Brown*, 20 Or. 530 (26 Pac. 561); *Denn v. Peters*, 36 Or. 486 (59 Pac. 1109).

4. But it is argued that the complaint does not state facts

sufficient to constitute a cause of action, because it does not allege in terms the time when the note sued on became due, and therefore the judgment should be affirmed. Tested by a demurrer, the complaint is probably defective; but the defendant answered over, and the objection was first made at the trial. In such case the pleading will be liberally construed, and will be aided by all the intendments that could be invoked after verdict. In speaking of the rule, when objection is made to the sufficiency of a pleading for the first time on the trial, Mr. Justice THAYER says: "The party in such case should be compelled to resort to a motion for judgment notwithstanding the verdict, in case one were to be rendered against him, as the party interposing the pleading ought, when it had not been demurred to, to be entitled to the presumptions a verdict in his favor would afford": *Specht v. Allen*, 12 Or. 117 (6 Pac. 494). And this is the settled law in this state: *Baker City v. Murphy*, 30 Or. 405 (42 Pac. 133, 35 L. R. A. 88); *Curry v. Butcher*, 37 Or. 380 (61 Pac. 631). Now, a verdict will cure all mere formal defects in the pleading: *Baker City v. Murphy*, 30 Or. 405 (42 Pac. 133, 35 L. R. A. 88); *Curry v. Butcher*, 37 Or. 380 (61 Pac. 631). And it will aid a defective statement of a good cause of action or defense, although it will not cure the omission of a material allegation. "The extent and principle of the rule of aid by verdict," says this court in *Booth v. Moody*, 30 Or. 222 (64 Pac. 884), "is that whenever the complaint contains terms sufficiently general to comprehend a matter so essential and necessary to be proved that, had it not been given in evidence, the jury could not have found the verdict, the want of a statement of such matter in express terms will be cured by the verdict, because evidence of the fact would be the same whether the allegation of the complaint is complete or imperfect. But, if a material allegation going to the gist of the action is wholly omitted, it can not be presumed that any evidence in reference to it was offered or allowed on the trial, and hence the pleading is not aided by the verdict." See, also, upon the same point, *Houghton v. Beck*, 9 Or. 325; *David v. Waters*, 11 Or. 448 (5 Pac. 748); *Weiner v. Lee Shing*, 12 Or. 276 (7 Pac. 111); *Bingham v. Kern*, 18 Or. 199 (23

Pac. 182); *Hargett v. Beardsley*, 33 Or. 301 (54 Pac. 203); *Foste v. Standard Ins. Co.* 34 Or. 125, 127 (54 Pac. 811). The complaint alleges that there was due and owing on the note mentioned therein a certain sum, and, while this allegation is perhaps a conclusion of law, it is nevertheless an attempt to state a material fact. It is not an omission of a material allegation, but, rather, a defective statement thereof, which, under the authorities cited, was waived by answering over.

The judgment will be reversed, and a new trial ordered.

REVERSED.

Argued 7 October; decided 21 October, 1901.

DELSMAN v. FRIEDLANDER.

[66 Pac. 297.]

PROMISSORY NOTE—GUARANTY—DEMANDING PAYMENT OF MAKER.

1. A guaranty of payment is an absolute promise to pay the guarantied obligation when due, no demand or notice is necessary to hold the guarantor, and mere passiveness on the part of the holder will not release the guarantor: *Weller v. Henarie*, 15 Or. 28, applied.

NOTE—CONTRACT OF INDORSEMENT.

2. An indorsement by the payee of a promissory note of the words, "I hereby guaranty payment of the within, and waive demand, notice of protest, and protest," on the back thereof is a contract of indorsement and not of guaranty.

WAIVING PROTEST—NEED OF CONSIDERATION.

3. Where on the day when a note was due the indorsers thereof signed a provision on the back of the note waiving demand, notice of protest, and protest, no consideration was necessary to uphold such waiver.

NOTE—PLEADING—PROOF—IMMATERIAL VARIANCE.

4. Where in an action on a note an indorsement was alleged to have been made, and the note delivered, November 20, it was competent to prove that the note was actually delivered, indorsed in blank, in the previous August, and that on November 20 an indorsement of a waiver of demand and notice of protest was made on the note.

From Multnomah: **ALFRED F. SEARS, JR., Judge.**

Action by Joseph Delsman against S. H. Friedlander and others. From a judgment in favor of plaintiff, defendant Friedlander appeals. **AFFIRMED.**

For appellant there was a brief over the name of *Bernstein & Cohen*, with an oral argument by *Mr. Alex. Bernstein*

For respondent there was a brief and an oral argument by *Mr. Robert C. Wright*.

MR. JUSTICE WOLVERTON delivered the opinion.

It is stated in the complaint that for value the defendants I. W. Baird and A. M. Baird, on July 19, 1893, executed to the defendant Friedlander their promissory note for \$1,000, payable four months after date; that on November 20, 1893, the defendants S. H. Friedlander and John D. Wilcox, for value received, indorsed and gaurantied payment of said note, waiving demand, notice of protest, and protest thereof, and delivered the same so indorsed to this plaintiff, who is now the owner and holder thereof. The answer of Friedlander sets up a discharge by reason of plaintiff's failure to make proper demand and give notice of nonpayment, and his delay and neglect to seasonably enforce collection while the defendants Baird were solvent. Trial was had without a jury, and the court found as conclusions of fact: (1) That the note in question was executed in manner as alleged. (2) "That in August, 1893, the plaintiff bought said note from the defendant S. H. Friedlander, and paid to him at said time the sum of \$900 therefor, becoming then the owner and holder of the note, and he has ever since been such owner and holder thereof; that at that time said defendants Friedlander and Wilcox indorsed said note in blank, and delivered same to the plaintiff. (3) That November 20, 1893, was the maturity and date of payment of said note; that on said date the plaintiff, through his agent, the United States National Bank of Portland, Oregon, requested the defendants Friedlander and Wilcox to sign the following indorsement and guaranty, to wit: 'November 20, 1893, for value received, I or we hereby guaranty payment of the within note, and waive demand, notice of protest, and protest.' (4) That said defendants Friedlander and Wilcox signed said above mentioned indorse-

ment and guaranty, and plaintiff did not make demand upon the makers for payment of said note at its maturity, and did not protest same. (5) That the only consideration for said indorsement and guaranty was that plaintiff did not go to the trouble and expense of protesting said note, which he would otherwise have done. (6) That at the time of maturity of said note both the makers of said note had property out of which payment would have been made, and both were financially able to pay the same, and remained so for nearly three years after the maturity of the note, but the plaintiff neglected to take any steps to enforce payment against said makers during said time or since, except the commencement of this action;” and as a conclusion of law that the defendants were liable. Judgment having been entered accordingly, Friedlander appeals.

1. The appellant maintains that the legitimate deductions from the findings of the court are that he is a guarantor, and that by reason of plaintiff’s neglect for more than three years, while the defendants Baird remained solvent, to take any steps towards the collection of the note, he is discharged from the obligation. Primarily, it may be stated as a legal proposition sustained and established by the very great weight of judicial opinion that a guaranty of the payment of a note or other obligation is an absolute undertaking to pay it when due, and that no demand or notice of nonpayment is necessary or requisite to fix the liability of the guarantor; and that mere passiveness on the part of the holder will not release such guarantor, even if the maker was solvent at its maturity, and thereafter became insolvent: *Roberts v. Hawkins*, 70 Mich. 566 (38 N. W. 575); *Hungerford v. O’Brien*, 37 Minn. 306 (34 N. W. 161); *Wheeler v. Lewis*, 11 Vt. 265; *Noyes v. Nichols*, 28 Vt. 159, 174; *Bloom v. Warder*, 13 Neb. 476 (14 N. W. 395); *Gage v. Merchants’ Nat. Bank*, 79 Ill. 62; *Penny v. Crane Bros. Mfg. Co.* 80 Ill. 244; *Breed v. Hillhose*, 7 Conn. 523; *City Sav. Bank v. Hopson*, 53 Conn. 453 (5 Atl. 601); *Baker v. Kelly*, 41 Miss. 696 (93 Am. Dec. 274); *Wright v. Dyer*, 48 Mo. 525; *Bank v. Sinclair*, 60 N. H. 100 (49 Am.

Rep. 307); *Read v. Cutts*, 7 Me. 186 (22 Am. Dec. 184); *Allen v. Rightmere*, 20 Johns. 365 (11 Am. Dec. 288); *Blair v. Ward*, 10 N. J. Eq. 119; *Clay v. Edgerton*, 19 Ohio St. 549 (2 Am. Rep. 422); *Bayley v. Hazard*, 3 Yerg. 487. And this court, so far as its adjudications go, is in harmony with the doctrine: *Weiler v. Henarie*, 15 Or. 28 (13 Pac. 614). The Pennsylvania cases are technical. In *Campbell v. Baker*, 46 Pa. 243, it is held that a guaranty of the payment of the note "when due" is broken by nonpayment at maturity, and the guarantor is then liable upon his contract to the creditor, who is not bound to either pursue the principal or show his insolvency, while the converse is held where the language is, "I guaranty the payment of the within note;" thus drawing a distinction between an undertaking to pay at a definite time and one to pay the obligation generally. And in Massachusetts the doctrine was formerly upheld in accordance with the appellant's contention (*Oxford Bank v. Haynes*, 8 Pick. 423, 19 Am. Dec. 334); but a later case has weakened the authority somewhat (*Vinal v. Richardson*, 13 Allen, 521), and the trend of recent decisions seems to be in one direction only.

2. This brings us to a consideration of the nature of Friedlander's undertaking,—whether as indorser or guarantor. Presumably, parties enter into contracts in view of the law, and, when terms or conditions are employed, that they are to serve a purpose. No demand or notice being requisite to charge a guarantor, a waiver thereof would have been idle ceremony upon the hypothesis that it was intended that Friedlander should enter into that relation. But, if the stipulation of waiver is considered in connection with the idea that he was to become an indorser only, then it has an important meaning, which has a significant bearing upon the transaction. Very few laymen are aware of the technical sense in which the term "guaranty" is often employed in contracts, and more often they use it in its general sense, as signifying to agree, promise, or undertake; and we are constrained, in view of the language employed, and the attending circumstances, to construe the undertaking to be such as arises

from an indorsement with waiver of demand, notice, and protest, and not as a guaranty. In this we are fully sustained by *Savings Bank v. Fisher* (Cal.), 11 Pac. 490.

3. The indorsement is alleged to have been made, and the note delivered, November 20, 1893, but the findings show that the note was sold by Friedlander, indorsed in blank by him and Wilcox, and delivered to the plaintiff in August, and that there was simply an indorsement of the waiver on November 20, 1893, the day the note fell due. Under these considerations the latter transaction is challenged as having been consummated without any consideration to support it. This specific transaction was voluntary, no doubt, and intended to effectuate merely a waiver of demand and notice, which must otherwise have been made on that day by the holder, and no consideration was necessary to uphold it.

4. That the indorsement was declared upon as having been made, and the note delivered, on November 20, is not of vital consequence, as it was competent to prove the transactions as they were actually consummated. Friedlander was, therefore, liable as an indorser, and this conclusion renders it unnecessary to consider the motion for nonsuit, as it is based upon the hypothesis that he was a guarantor. **AFFIRMED.**

Argued 2 October; decided 21 October; rehearing denied 16 December, 1901.

SCOTT v. LEWIS.

[66 Pac. 299.]

EFFECT OF NOTICE OF OUTSTANDING EQUITIES.

A purchase-money mortgagee, who voluntarily releases the mortgage and takes a reconveyance of the mortgaged premises, knowing, or having the means of knowing, that the mortgagor has executed a bond for title therefor, takes the property subject to the equity so created, in the absence of accident, fraud, or mistake; and the holder of such a bond may enforce it against all persons knowing or being chargeable with notice of his claims.

From Yamhill: **REUBEN P. BOISE**, Judge.

Suit by C. A. Scott against Joseph R. Lewis. From a decree in favor of plaintiff, defendant appeals. **AFFIRMED.**

For appellant there was a brief over the name of *Cotton, Teal & Minor*, with an oral argument by *Mr. Wirt Minor*.

For respondent there was a brief over the name of *Ramsey & Fenton*, with an oral argument by *Mr. William M. Ramsey*.

MR. JUSTICE MOORE delivered the opinion of the court.

This is a suit in the nature of a cross bill to enjoin proceedings in an action at law and to compel the execution of a deed to certain real property. The transcript shows that on April 18, 1892, one James M. Scott secured the possession of lots numbered 11, 12, 13, 14, 17, 19, 20, 21, 22, and 25, in Oaks Fruit Farm, Yamhill County, Oregon, containing sixty-eight and thirty hundredths acres, under a contract with the defendant, by the terms of which he was to pay one third of the purchase price in six months, and the remainder in one, two, and three years, it being stipulated that upon the payment of the first installment he was to receive a deed to the premises, and give a mortgage thereon to secure the promissory notes evidencing the deferred payments, in pursuance of which the deed and mortgage were duly made on October 27, 1892, and July 25, 1893, respectively, but they were not recorded until November 1, 1893. Scott having offered to give his son, the plaintiff herein, five acres of said land if he would move thereto from Nebraska and build a house thereon, the latter, in pursuance thereof, made the journey with his family to this state, whereupon his father, in April, 1893, gave him possession of said lot 20, containing five and forty-five hundredths acres, upon which he erected a house, barn, and other buildings, put down a sidewalk, built some picket fence, dug a well, and set out some berries and fruit trees, expending thereon and in traveling about \$480; and on April 19, 1894, received from his father a bond for a deed, containing a covenant to convey said lot by a good and sufficient deed at any time within five years, upon the payment of \$25, being the consideration for the land received in excess of that promised. Default having been made in the payment of said promissory notes, James M. Scott, on August 25, 1897, executed to the defendant a quit-

claim deed of all his interest in said lots, receiving as a consideration therefor a surrender of said notes, a release of the mortgage, and an option to purchase, at any time before January 1, 1898, said lots 20, 21, and 26 of said tract for the sum of \$1,100, of which \$300 was to be paid within the time specified, whereupon he was to receive a deed therefor, and give a mortgage thereon to secure promissory notes of \$500 and \$300, payable in one and two years, respectively; and it was stipulated that upon the payment of \$200 on account of the mortgage—thus making a cash payment of \$500—the defendant was to release lot 20 from the lien of said mortgage. The plaintiff thereafter filed said bond for a deed to lot 20 for record, and, refusing to surrender possession, the defendant commenced an action against him therefor. An answer was filed therein, in which it was averred by the plaintiff herein that he had a full and complete defense to the complaint in equity, but not in law, and with said answer filed the complaint herein, alleging in part the facts hereinbefore stated, and averring that at the time defendant accepted said quit-claim deed he had full knowledge and notice that the plaintiff was in the actual, visible, exclusive, and adverse possession of said lot 20, claiming to be the owner thereof; that within the time specified therefor he tendered to the defendant the sum of \$25, and demanded a deed for said lot, but, the defendant having refused to comply therewith, he deposited said sum with the clerk for him. The answer denies the material allegations of the complaint, and avers that the deed executed by the defendant and James M. Scott's mortgage were simultaneously delivered, and that the plaintiff took whatever interest he secured in said lot with knowledge and notice of the defendant's rights thereto. The reply having put in issue the material allegations of new matter in the answer, a trial was had, resulting in a decree as prayed for, and the defendant appeals.

It is contended by defendant's counsel that the security given by James M. Scott was a purchase-money mortgage, which, having been delivered in exchange for the deed, the lien thereby created is paramount to any equitable estate in the

mortgaged premises arising by, through, or under the mortgagor, and hence the court erred in the decree complained of. We think the point insisted upon is without merit, for the defendant, having intentionally satisfied the mortgage, necessarily rendered the said lots liable to the equities imposed upon them by the mortgagor while the legal title was vested in him. If James M. Scott, for a valuable consideration, had conveyed any or all of these lots during the time he held the legal title, the purchaser thereof, upon recording his deed, would have taken an estate in the premises superior to the defendant's mortgage when the lien thereof was discharged. The object of recording acts is to furnish notice to intending purchasers of real property of the condition of the title and of the names of the persons in whom it is vested. Such notice is imparted, however, in the absence of a recorded deed, if the intending purchaser sees a stranger to the title in open, notorious, and exclusive occupation of the premises claimed by the pretending vendor, who, from the record, appears to hold the legal title, and fails to inquire of the person so in possession what right he claims in the premises. He is chargeable with such notice as a truthful answer to the inquiry, if propounded, would elicit: *Exon v. Dancke*, 24 Or. 110 (32 Pac. 1045). Equity protects a parol gift of land if the donee, induced thereby, takes possession of the premises, or makes valuable improvements thereon: *Barrett v. Schleich*, 37 Or. 613 (62 Pac. 792); *Bakersfield, etc. Assoc. v. Chester*, 55 Cal. 98; *Irwin v. Dyke*, 114 Ill. 302 (1 N. E. 913); *Story v. Black*, 5 Mont. 26 (1 Pac. 1, 51 Am. Rep. 37). The testimony shows that the plaintiff, induced by his father's offer to give him five acres of land in this state, moved thereto from Nebraska, and settled upon the lot in question, upon which he made valuable improvements, in pursuance of and while relying upon his father's representation that he would give him a deed to the property if he would build a house thereon. Such a performance of the parol agreement would undoubtedly be sufficient to entitle the plaintiff to a specific performance of the contract in a suit instituted for the purpose against his father, if he

were the holder of the legal title: *Barrett v. Schleich*, 37 Or. 613 (62 Pac. 792). The plaintiff having only an equitable estate in the lot at the time his father executed said quitclaim deed, it remains to be seen whether the defendant's knowledge of the plaintiff's possession and improvement of the lot is sufficient to put a reasonably prudent person upon inquiry, which, if prosecuted with ordinary diligence, would create a presumption that the search, if prosecuted, would have resulted in ascertaining the extent of the estate claimed in the premises. If this inquiry is answered in the affirmative, it follows that the contract can be enforced against the defendant, notwithstanding the plaintiff was in possession of the lot under an unrecorded agreement with the owner to purchase the same: *Moss v. Atkinson*, 44 Cal. 3; *Hyde v. Mangan*, 88 Cal. 319 (26 Pac. 180).

James M. Scott, as plaintiff's witness, testifies that in the spring of 1896, at Seattle, Washington, he informed the defendant that his son had settled upon said lot, and that he had invested all the money that he possessed in making the improvements thereon; and the witness, having paid quite a sum on account of the purchase of the lots, requested the defendant to execute to the plaintiff a deed to lot 20, which he refused to do. The plaintiff, as a witness in his own behalf, corroborates his father in this respect, saying that he was present on that occasion, but took no part in the conversation. The plaintiff's wife testifies that on August 19, 1897,—about a week before the quitclaim deed was executed,—the defendant visited the lot in question, saw the improvements which had been made thereon, and informed her that he expected to make some settlement with her father-in-law in respect to the money which he owed him, intimating that he might accept a conveyance of the premises. She told the defendant that her husband, who was then absent, had put all his money into the improvements made upon the place, whereupon he informed her that, if he took the land back, he would give them an opportunity of retaining their home. The plaintiff, upon his return, wrote the defendant as follows:

“DAYTON, Oregon, Sept. 24, '97.

“*Mr. Lewis—*

“DEAR SIR: On returning from British Columbia, I learn that father had deeded back the property to you, and that I also understood from my wife that I could have my wood or anything that we had individually on the place. Of course, I do not mean the buildings, or any line fences or permanent fixtures on the place. All that I thought that I was at liberty to take was some wood that I had cut; and I had borrowed and bought \$250 worth of wire that I had strung temporarily through the timber to keep Mr. Rowley's stock from getting into the grain. The wire was not on the line, and that it was partly on the piece of land that Mr. Rowley had lately bought, and partly on your land. I had no thought of any trouble when I took the wire off, supposing that I was at liberty to take it, as over half the wire was only borrowed. I had contemplated buying lot 25, adjoining 20 at the lower end, but I have been informed that you had threatened to put me off the place. Let me hear from you as soon as possible, so that, if you insist on our leaving the place, I shall have to look elsewhere for a home. I want to hear from you directly; then I shall know. I have returned the borrowed wire, and the remaining portion is on our place. If you want me to pay you for the wire I can do so. Yours respt.,

“C. A. SCOTT.”

This letter, having been received after the quitclaim deed was executed, can have no effect in determining the rights of the parties, except, possibly, to show the plaintiff's previous intention in respect to claiming lot 20. In explaining the contents of the letter, he testifies that when it was written he had no knowledge of his rights in the premises. Having ascertained that his father had conveyed all his interest in the lots to the defendant, and knowing that he had no deed for lot 20, he may have reasonably supposed that his rights therein were extinguished. While the maxim, “*Ignorantia juris non excusat*,” would probably bar his securing the title to said lot by a suit in equity against the defendant, on the ground of estoppel, if his letter had been received before his father's quitclaim deed was delivered and the mortgage released, such result cannot follow in the present instance, because the de-

fendant neither relied nor acted upon the information contained in the latter.

The testimony shows that James M. Scott is a minister of the gospel, and that his duties kept him employed in the State of Washington, so that he never resided upon said lots, though he visited the premises about three times after his son settled thereon, remaining a few days each time. At the time the quit-claim deed was executed, the plaintiff, though absent, was in possession of all the other lots as the tenant of his father, but the testimony does not disclose when such tenancy began. The plaintiff's wife did not inform the defendant that her husband claimed any estate in the premises, nor did his father impart any information of that character when he executed the quit-claim deed; and, while they are related to the plaintiff, they do not appear to have been his agents. The option having been granted to his father would seem to rebut any inference of agency, while the defendant's written agreement to release lot 20 from the lien of the mortgage to be placed thereon, if the option were exercised, tends to show that the defendant knew that the plaintiff had some equitable claim thereon. We do not understand that it was incumbent upon the plaintiff's wife, who did not claim to be the owner of any interest in lot 20, to notify the defendant of her husband's claim thereto, but that, the defendant having found her in possession thereof, in the absence of her husband, the duty of making inquiry in respect to any equitable claim thereto was imposed upon him. As was said by Mr. Justice COLE in *Dickey v. Lyon*, 19 Iowa, 544: "A person who purchases an estate in the possession of another than his vendor is, in equity—that is, in good faith—bound to inquire of such possessor what right he has in the estate. If he fails to make such inquiry, which ordinary good faith requires of him, equity charges him with notice of all the facts that such inquiry would disclose." It will be remembered that James M. Scott was the holder of the legal title, and hence the plaintiff was a stranger thereto, and his possession and improvement were sufficient, in our judgment, to attract the attention of a reasonably prudent man,

and cause him to make inquiry, which, if prosecuted, must necessarily have resulted in knowledge of plaintiff's equity, and for this reason the defendant is chargeable with notice: *McDougal v. Lane*, 39 Or. 212 (64 Pac. 864).

It is contended by defendant's counsel that the plaintiff does not offer to do equity by paying the purchase price of the land, and hence the decree should be reversed. When plaintiff's father conveyed his interest in the lots to the defendant, who voluntarily canceled the mortgage, the legal estate and lien became merged in him. If, however, he was induced by accident, fraud, or mistake to cancel the mortgage in ignorance of the facts, a court of equity would have restored his lien: *Pearce v. Buell*, 22 Or. 29 (29 Pac. 78); *Kern v. Hotelling*, 27 Or. 205 (40 Pac. 168, 50 Am. St. Rep. 710); *Capital Lum. Co. v. Ryan*, 34 Or. 73 (54 Pac. 1093); *Rumpp v. Gerken*, 59 Cal. 496; *Shaffer v. McCloskey*, 101 Cal. 576 (36 Pac. 196). He had an opportunity to present this question, but neglected to make it an issue, and, having failed to ask for equitable intervention, and relied upon the title conveyed by the quitclaim deed, it follows that the decree is affirmed.

AFFIRMED.

Argued 16 October; decided 28 October; rehearing denied 25 November, 1901.

KERSLAKE v. BROWER LUMBER COMPANY.

[66 Pac. 437.]

ESTOPPEL—INCONSISTENT CLAIMS—ELECTION.*

A litigant will not be permitted to assume inconsistent positions in a legal proceeding, but must elect to pursue one remedy or another; as, for example, a creditor of an insolvent cannot claim part of the fund created from the assigned property and at the same time insist that the assignment is void.

IDEM.

Where a creditor of an insolvent wishes to repudiate an assignment on the ground that it is illegal and fraudulent, he should apply to set the assignment aside.

*NOTE.—The question of the effect of pursuing one of several remedies is considered in different forms in the notes to the following annotated cases: *Thomas v. Joslin*, 1 Am. St. Rep. p. 629; *Fowler v. Brewery Sav. Bank*, 4 L. R. A. 145, 10 Am. St. Rep. p. 486; *Conroy v. Little*, 5 L. R. A. 693; *Terry*

From Multnomah: ARTHUR L. FRAZER, Judge.

On June 21, 1894, the Brower & Thompson Lumber Company, an insolvent corporation (hereinafter designated as the "Lumber Company"), conveyed all of its property, real and personal, by deed and bill of sale absolute in form, to one E. H. Thompson, in trust, however, "for the benefit of all its creditors, without any preference or priority, other than provided by law." The declaration of trust was never placed on record, but Thompson immediately took possession of all the property of the lumber company, and continued to manage, control, and dispose of the same in accordance with the terms of his trust until he was removed by the court below in this suit. After he had taken possession of the property, and on August 14, 1894, the Latourelle Falls Wagon Road & Lumber Company (hereinafter designated as the "Wagon Road Company") commenced an action at law against the lumber company to recover \$4,865.63 on an account accruing prior to its deed to Thompson, and on the same day attached, or attempted to attach, all the property conveyed thereby. A few days later it commenced a suit, based upon such attachment, to set aside and declare null and void the conveyances from the lumber company to Thompson, on the ground that they were made for the purpose of hindering, delaying, and defrauding creditors. Although issue was joined in that suit a short time after its commencement, it is still pending and undetermined. On April 22, 1895, the wagon road company recovered a judgment in the action for \$2,000, and for the sale of the attached property. Thereafter, and on the twenty-third of August, 1895, this suit was commenced by certain judgment creditors of the lumber company on behalf of themselves and all other creditors and stockholders of the company. The complaint, after alleging the deed and bill of sale from the

v. Munger, 8 L. R. A. 216, 18 Am. St. Rep. p. 810; *Crossman v. Universal Rubber Co.* 13 L. R. A. 91; *Mills v. Parkhurst*, 13 L. R. A. 492; *Miller v. Hyde*, 25 L. R. A. 42, 42 Am. St. Rep. p. 424; *Agar v. Winslow*, 69 Am. St. Rep. p. 89; *Colby v. McClintock*, 73 Am. St. Rep. p. 559.—REPORTER.

lumber company to Thompson, and setting out in full the declaration of trust executed contemporaneously therewith, further alleges that immediately upon the execution and delivery of such instruments Thompson entered into and took possession of the property, and has ever since kept such declaration of trust secret, and claimed the property as his own, with the intent and purpose of hindering, delaying, and defrauding the creditors of the lumber company, and has colluded with the president and secretary thereof for that purpose; that he has disposed of a large quantity of lumber assigned to him in trust, and collected debts due the company, and refused to account to the creditors therefor, but converted the same to his own use; that he has failed to file an inventory of the estate, or make any report as to its condition or value, or to give security for the faithful performance of his trust; that he has wasted and is still wasting the funds of the company, and is wholly insolvent. The prayer is for a decree removing Thompson as assignee, and for the appointment of an assignee or receiver to take possession of the property of the lumber company, and dispose of the same under the orders of the court.

Answers were filed, denying the breaches of trust by Thompson alleged in the complaint, and upon a hearing in January, 1896, the court made an order removing Thompson, because of his previous connection with the lumber company, and appointing Mr. Malcolm as receiver, "to carry out said assignment." Immediately thereafter Thompson, as required by the order, conveyed the trust property to Malcolm, who proceeded to sell and dispose of the same from time to time as directed by the court, and on the eighteenth day of September, 1899, filed his final report as such receiver. Thereupon the assignees of the judgment in favor of the wagon road company filed a petition in the receiver proceeding, claiming a prior and superior lien on all the funds in the receiver's hands by reason of the levy of the attachment after the deed from the lumber company to Thompson. The petition alleges, in substance, the commencement of the action by the wagon road company

against the lumber company in August, 1894, the issuance and levy of the writ of attachment, the recovery of the judgment, the appointment of Mr. Malcolm as receiver, the amount of money he then had on hand for distribution, the insolvency of the lumber company, and asks that its judgment be paid from such fund in preference to all other claims. The prayer of the petition was denied, and the petitioners appeal. Messrs. George, Gregory & Duniway, who were attorneys for Thompson during the time he was acting as trustee, and who rendered some professional services for Mr. Malcolm after his appointment as receiver, also filed a petition setting up their claim, and asking for an order directing the receiver to pay the same out of the funds in his hands. This petition was allowed in part only, and they also appeal. **AFFIRMED.**

For Watson and others, intervenors, there was a brief over the name of *Watson & Beekman*, with an oral argument by *Mr. Edward B. Watson*.

For George and others, intervenors, there was a brief over the name of *George, Gregory & Duniway*, with an oral argument by *Messrs. Ralph R. Duniway* and *Wm. M. Gregory*.

MR. CHIEF JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

1. The assignees of the wagon road company claim a preferred lien on the fund in the hands of the receiver by virtue of the attachment of August 14, 1894, and in support thereof insist that the prior deed or assignment to Thompson was illegal and void, because (1) it was not a statutory assignment for the benefit of creditors; (2) it was not assented to by the wagon road company, and therefore not binding on it; and (3) it was made for the purpose of hindering, delaying, and defrauding creditors. But, as we understand the law, none of these objections can be urged by the petitioners in this proceeding. They can not claim the benefit of a fund derived under a deed of assignment, and at the same time insist that

such deed is illegal and void. The rule is that one who wishes to repudiate an assignment or trust deed on that ground must bring an appropriate proceeding for that purpose, instead of claiming the fund thereunder: "In the case of a voluntary assignment," observes Mr. Chancellor WALWORTH, "where the assignor creates his own trusts, a creditor who comes in to claim a share of the fund under it must be content to take such share of it as the assignor intended to give him, and can not claim that which was intended to be given to the assignees in trust. A creditor of the assignor, whether provided for by the assignment or not, who wishes to repudiate the trusts of the assignment on the ground that they are illegal and a fraud upon the honest creditors of the assignor, must apply to set aside the assignment as fraudulent and void against him as a creditor, instead of coming in under the assignment itself as a preferred creditor or otherwise": *Pratt v. Adams*, 7 Paige, 615, 641. And Mr. Chief Justice GIBSON says: "The books are full of cases which show that a party shall not contest the validity of an instrument from which he draws a benefit, nor affirm it in part and disaffirm it in part": *Irwin v. Tabb*, 17 Serg. & R. 419. See, also, *Frierson v. Branch*, 30 Ark. 453; *Adler-Goldman Commission Co. v. People's Bank*, 65 Ark. 380 (46 S. W. 536); *O'Bryan v. Glenn*, 91 Tenn. 106 (17 S. W. 1030, 30 Am. St. Rep. 862); *McLaughlin v. Park City Bank*, 22 Utah, 473 (63 Pac. 589). The reason of this rule is that a creditor is not entitled to two inconsistent and adverse rights. He is required to elect which one he will adopt, and the election of one is necessarily the rejection of the other. So that neither the wagon road company nor its assignees are entitled to claim the benefit of the proceeds of property acquired and disposed of under the deed of trust from the lumber company to Thompson, and at the same time deny the validity of the deed.

But it is argued that they are not making such a claim, and that the suit in which Malcolm was appointed receiver was in the nature of a creditors' bill to set aside and avoid the deed from the lumber company to Thompson, and such was the

effect of the order removing Thompson and appointing Malcolm, thereby giving a preference to the prior attachment of the wagon road company. But there are no allegations in the complaint or findings by the court upon which such an argument can be based. The plaintiffs did not seek to avoid the transaction between the lumber company and Thompson, but to enforce them. Their complaint contains no allegations upon which a decree setting aside the deed could be based, it simply charges Thompson with repudiating his trust and violating his duties as a trustee, and for that reason asks that he be removed, and some suitable person appointed to carry out the trust; and such was the decree of the court. The assignment to Thompson was recognized as valid by all the parties to the proceedings and by the court. It is true, the court made a finding that the property theretofore transferred to him was in equity the property of the company, and that he had no beneficial interest therein; but it did not find that the transaction was illegal, fraudulent, or void, nor did it render any decree to that effect. On the contrary, the decree appointing Malcolm as receiver recognizes the validity of the trust deed or assignment, and appoints him to carry out its provisions. The money in the hands of the court for distribution when the decree appealed from was entered was received in pursuance of such decree, and it is not open to any of the parties seeking to share in such distribution to question in this proceeding the validity of the deed to Thompson.

The only question presented by the appeal of Messrs. George, Gregory & Duniway was the amount to which they were entitled as attorneys, and, as the trial court was in a better position than this court to determine that question, we are not disposed to disturb its findings. The decree of the court below will therefore be affirmed, the costs of this appeal to be paid out of the surplus remaining in the hands of the receiver after the claims allowed by the court below have been satisfied.

AFFIRMED.

Argued 14 October ; decided 28 October, 1901.

THOMAS v. PORTLAND.

[66 Pac. 439.]

INVALID STREET ASSESSMENTS—CONSTRUCTION OF CURATIVE ACT.

1. Section 156 of the Portland Charter of 1898 (Laws, 1898, pp. 101, 163), providing that, if, on the completion of any street improvement, when the cost thereof is declared by the common council to be a charge on the adjacent property, any assessments levied to defray the cost thereof are adjudged to be invalid, the city may bring actions against the owners of abutting property on which the cost of such improvement might be charged, and recover the cost of such improvement, was not intended to and does not in and of itself cure or confirm defective assessments, but was intended to afford a new remedy for the enforcement of assessments that have been judicially declared void, and only such are affected.

ACT CURING VOID ASSESSMENTS—DUE PROCESS OF LAW.

2. An act providing that, after an assessment for a public improvement has been adjudged void the municipality may maintain an action against the owners of the property assessed, is not a taking of property without due process of law, for the parties affected are allowed a day and time to be heard on the right and manner of assessment.

RES JUDICATA.

3. A decree declaring void an assessment for a public improvement is not a bar to a subsequent action or suit by the municipality to collect the cost of the work from the property benefited.

From Multnomah: JOHN B. CLELAND, Judge.

Suit by E. A. Thomas and others against the City of Portland and others. From a decree in favor of the plaintiffs, the defendants appeal. AFFIRMED.

For appellants there was a brief over the names of *Joel M. Long*, City Attorney, and *Ralph R. Duniway*, with an oral argument by *Mr. Duniway*.

For respondents there was a brief over the names of *Wm. M. Gregory* and *Geo. Gordan Gammons*, with an oral argument by *Mr. Gregory*.

MR JUSTICE WOLVERTON delivered the opinion.

In March, 1898, the common council of the City of Portland by ordinance declared it expedient and necessary to

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repair Corbett Street from the westerly line of Hood Street to the north line of Bancroft Avenue, and directed that the cost of such repair be assessed upon the adjacent property. The nature of the work undertaken, however, was not, as a matter of fact, a repair, but an original improvement. This is conceded by the appellants, and the case is presented upon that hypothesis. Subsequently the common council proceeded to make the improvement without the petition of property owners prescribed by section 98 of the city charter of 1893 (Laws, 1893, pp. 777, 842), assessed the abutting property with the cost of the improvement, and had a statement thereof entered in the docket of city liens. Warrants having been thereafter issued, directing the collection by levy and sale of the property involved, this suit was instituted to restrain proceedings thereunder, and to declare the assessments void. A general demurrer to the complaint having been overruled, the defendants answered, alleging a ratification of the acts of the common council in making such assessments, by virtue of the provisions of section 156 of the charter of the City of Portland, as adopted by the legislative assembly October, 1898 (Laws, 1898, pp. 101, 163), thereby barring the further prosecution of the suit. A decree having been rendered in accordance with the prayer of the complaint, the defendants appeal.

1. It is urged in their behalf that this section of the charter of 1898, *ex proprio vigore*, cures, ratifies, and confirms the assessments complained of, and therefore renders the absence of the petition of no avail to the plaintiffs. If they are right, the question could as well be determined on the demurrer as upon the answer, as the proceedings must have been held validated on demurrer with respect to the attending infirmity, which it is admitted would otherwise render the assessment void, and consequently no suit would lie to nullify them. Tersely stated, so far as the section has a bearing here, it provides that if, upon the completion of any street improvement, etc., when the cost thereof is declared by the common council to be a charge upon the adjacent property, any assessment or assessments levied to defray the cost thereof are

found or adjudged to be invalid because of defects, jurisdictional or otherwise, occurring in any stage of the proceedings, the city is empowered to bring actions against the owner or owners of abutting property upon which the cost of such improvement, etc., might or could be charged and imposed under the provisions of the act, and recover the cost of such improvement, etc., property chargeable thereunder to the several parcels of land involved. This has relation to assessments made under the charter of 1898. A similar provision is made in relation to assessments levied under prior charters, except that the amount recoverable is the proportion of the cost theretofore charged to the several parcels of land involved. There is here no validation of the assessments as made by the common council, so that the same may be enforced in the manner pointed out by the charter, notwithstanding any irregularity attending their consummation; but in the section under consideration the purpose is patent to treat as effective the finding or adjudication of invalidity, and to provide an entirely new remedy, in which the defects attending the assessment may be disregarded.

It would not be competent for the legislature to validate such an assessment, notwithstanding an adjudication of a court declaring it a nullity, and thus permit it to be enforced in the manner pointed out by the charter, through the issuance of a warrant and levy and sale of the property thereunder. A statute which operates to annul or set aside the final judgment of a court of competent jurisdiction, and to disturb or defeat rights thus vested, is inoperative and void. By reason of the distribution of powers under the constitution, assigning to the legislature and the judiciary each its separate and distinct functions, one department is not permitted to trench upon the functions and powers of the other. As Chief Justice BIGELOW observed in *Denny v. Mattoon*, 2 Allen, 361, 378 (79 Am. Dec. 784): "It is the exclusive province of courts of justice to apply established principles by rendering judgments and executing them by suitable process. The legislature have no power to interfere with this jurisdiction in such manner as

to change the decision of cases pending before courts, or to impair or set aside their judgments, or to take cases out of the settled course of judicial proceeding. It is on this principle that it has been held that the legislature have no power to grant a new trial or direct a rehearing of a cause which has been judicially settled * * * A *fortiori*, an act of the legislature cannot set aside or annul final judgments or decrees. This is the highest exercise of judicial authority." But we need not pursue this special subject further, as the law was so declared by this court in *Nottage v. City of Portland*, 35 Or. 539, 556 (58 Pac. 883, 76 Am. St. Rep. 513), and the section under discussion held not to be obnoxious to the rule. Statutes relating to the validation and curing of assessments and tax proceedings have become quite common, and the modes adopted for effectuating the purpose are as diverse, almost, as the statutes themselves, the legislation being formulated and directed to meet the emergencies as they arose; and it may be said of such legislation, it being remedial in its character, that it has generally received a liberal construction, with a view of giving it substantial effect. Perhaps the most general form of curative legislation is to adopt a scheme of reassessment. This may apply generally, or be directed to specific cases. Such reassessments are usually intrusted to the officers whose duty it was to make the assessment in the first instance. But the duty is not infrequently assigned to different and distinct bodies or functionaries, and even the legislature itself has made the curative assessment: *Cooley*, Taxation (2 ed.), 309; *Schenley v. Commonwealth*, 36 Pa. 29, 56 (78 Am. Dec. 359); *Richman v. Supervisors*, 77 Iowa, 513 (42 N. W. 422, 4 L. R. A. 445,* 14 Am. St. Rep. 308**); *In re Van Antwerp*, 56 N. Y. 261; *Tifft v. City of Buffalo*, 82 N. Y. 204; *Frederick v. City of Seattle*, 13 Wash. 428 (43 Pac. 364); *City of Emporia v. Norton*, 13 Kan. 569; *Mattingly v. District of Columbia*, 97 U. S. 687; *State ex rel. v. City of Newark*, 34 N. J. Law, 236.

*See briefs of counsel in full.

**See note, Construction of Curative Acts.

The rationale upon which such curative legislation proceeds is that there has been a futile attempt to levy an assessment, where the parties affected are in justice and in equity bound to contribute to the public demand, and that they ought not to be permitted to escape the burden by reason of some oversight or nonobservance of the prescribed mode of proceeding in the first instance, where the irregularities do not extend to an act or omission that the legislature is without power to authorize primarily. In all such cases the legislature may prescribe a new remedy, so as to require payment, when justice and equity demand it. As was said by Mr. Chief Justice DIXON in *Mills v. Chaleton*, 29 Wis, 400 (9 Am. Rep. 578); "The taxing power, when acting within its legislative sphere and unrestrained by positive constitutional provision, is a far-reaching and unlimited power, which knows no stopping place nor moderation of force until it has accomplished the purpose for which it exists, namely, the actual enforcement and collection of the tax. It moves constantly forward to its object until that is accomplished, and, if turned aside by any obstacles or impediments, may return again and again to the same tax or assessment, until, the way being clear, the tax is paid or the assessment collected." In the exercise of this power the legislature may revise or validate retrospectively all tax proceedings that it might have authorized prospectively, and it may cure defects and render immaterial statutory requirements that it could have dispensed with in the first instance. Beyond this it cannot go, and all acts intended as curative, where it is without power or authority to devise the mode and direct an assessment primarily, are without validity. Now, by the express terms of section 156 (Laws, 1898, pp. 101, 163), it is without application until the assessment is found or adjudged to be invalid, and it was not intended to validate wherever or whenever an irregularity existed, and thus relieve the authorities from an observance of the charter provisions relative to street improvements and assessments. The clear purpose of the section was undoubtedly to afford a remedy where the regularly prescribed assessments have been nulli-

fied, and in no other event can it have application. It being assumed by the legislature, as it had the right to do, that the parties involved, although not bound by the letter of the law to pay the demand assessed upon their property, yet, notwithstanding, they were in justice and equity obligated to that end, it has devised and prescribed a new remedy, which is not by the issuance of a warrant upon the original assessment, and levy and sale thereunder, but by an action, so denominated, in the circuit court, where all interested parties might be brought before it and the lien established and enforced by decree.

2. The new remedy prescribed may be said to be in the nature of a reassessment, although all the formalities required by the original assessment are not prescribed or required to be observed: (see *In re Van Antwerp*, 56 N. Y. 261), but the parties interested are given their day in court, and an opportunity to be heard upon all questions of legislative power and jurisdiction, so that they are not deprived of any rights or property without due process of law.*

Nor is it a valid objection to invoking the remedy that the property has changed hands in the meantime: *Tallman v. City of Janesville*, 17 Wis. 73.

Thus it seems to us that a proper construction of section 156 precludes the idea that it operates to cure all irregular assessments at once, and as against the authority of the courts to decree them void, but that it is without application until they have been found or adjudged to be invalid, at which time it becomes operative, as affording a new and more effective remedy for the enforcement of an equitable obligation. In this view, the section does not constitute a bar to the jurisdiction of a court of equity to annul the original assessment: *Nottage v. City of Portland*, 35 Or. 539 (76 Am. St. Rep. 513, 58 Pac. 883), does not impinge upon this construction, nor is it authority for defendants' contention. There an action had been instituted to recover from the city a sum of money paid to it

*NOTE.—Constitution of the United States, Fifth Amendment.

by an abutting owner under an assessment that had been subsequently nullified by an adjudication of the court. The question was whether section 156 afforded a defense to the action, and it was held that it did. The adjudication of invalidity had preceded the action, and the condition existed that gave it operation. It was not determined that the effect of the section was to ratify and confirm the assessment so as to validate it at once and effectually for all purposes, but that the answer of the city, setting up the statute as a defense, was for all practical purposes equivalent to the bringing of an action, within its meaning and purpose.

3. It is suggested that the suit should, in any event, be dismissed, without prejudice to another, for the reason that it might stand in the way of the action under the charter; but a decree is not a bar to the new remedy or proceeding: *Cooley, Taxation* (2 ed.), 312; 2 *Dillon, Mun. Corp.* (4 ed.) § 814; *City of Emporia v. Norton*, 13 Kan. 569; *Frederick v. City of Seattle*, 13 Wash. 428 (43 Pac. 364).

The decree of the court below will therefore be affirmed and it is so ordered. AFFIRMED.

Argued 15 October; decided 28 October, 1901.

OREGON REAL ESTATE COMPANY v. PORTLAND.

[66 Pac. 442.]

VOID STREET ASSESSMENTS—CONSTRUCTION OF CURATIVE ACT.

1. Section 156 of the Portland Charter of 1898 (Laws, 1898, pp. 101, 163), providing that if, on the completion of any street improvement, when the cost thereof is declared to be a charge on the adjacent property, any assessments levied are adjudged invalid, the city can sue the owners of abutting property, and recover the cost of such improvement, does not cure, ratify or confirm void assessments, but is available only after a judicial adjudication that the assessment is invalid: *Thomas v. Portland*, 40 Or. 2. followed.

STREET IMPROVEMENT—REPAIRS—EFFECT OF REMONSTRANCE.

2. Where, in an attempt of a city to carry forward the improvement of a portion of a street and the repair of the remainder as a single undertaking, the improvement proceedings are invalid, the portion to be repaired is left to be proceeded with as a separate undertaking; and a remonstrance of the owners of more than one half of the property adjacent to and assessed for the repair, becomes effective, so as to render the proceedings and subsequent assessment void.

From Multnomah: JOHN B. CLELAND, Judge.

Suit by the Oregon Real Estate Company to restrain the City of Portland and its officers from enforcing the collection of sundry street improvement warrants by a sale of plaintiff's property, and to annul them. There was a decree granting part of the relief demanded, from which both parties appeal.

REVERSED.

For appellant there was a brief over the name of *Pipes & Tift*, with an oral argument by *Mr. Martin L. Pipes*.

For respondents there was a brief over the names of *Joel M. Long*, City Attorney, and *Ralph R. Duniway*, with an oral argument by *Mr. Duniway*.

MR. JUSTICE WOLVERTON delivered the opinion.

In March, 1898, the common council of the City of Portland, by regular ordinance, declared it expedient and necessary to repair Union Avenue from the north line of East Burnside Street to the south side of Weidler Street, in the City of Portland, and directed that the cost of such repair be assessed upon the adjacent property, in pursuance of sections 124 and 125 of the city charter then in force (Laws, 1893, pp. 810, 849). The kind of work directed to be done was as follows: "First. From the north line of East Burnside Street to the south line of Weidler Street, save and except the elevated roadway from a point twelve feet north of the south line of East Everett Street to a point one hundred and forty-five feet north of the north line of East Flanders Street, by removing from that portion of the street not covered with gravel all the mud, earth, and debris to subgrade, and by removing all the loose earth, mud, and debris from the surface of the graveled portions of the roadway; by bringing the roadway to the established grade full width, with full intersections, with gravel; by constructing sidewalks twelve feet wide, with six-foot covering planks, and new crosswalks, six feet wide, and constructing box

gutters. Second. From a point twelve feet north of the south line of East Everett Street to a point one hundred and forty-five feet north of the north line of East Flanders Street, by putting in new mudsills at both ends of the bridge, and new foundation under bents, where necessary, and cutting off and splicing decayed posts; by putting on new caps and supercaps, and putting new posts in one bent; by putting new stringers in the roadway and sidewalks; by recovering the roadway with four-inch by twelve-inch yellow fir covering planks, and the sidewalks with two-inch by eight-inch yellow fir planks; and by repairing the fences." The bridge to which this latter repair alludes is four hundred and fifty feet long, and extends across the entire space designated above. The work having been completed, the cost thereof assessed upon the abutting property, and warrants issued to enforce collection, the plaintiff brings this suit to restrain the levy and sale of its abutting property, and to have the assessment thereon declared void as a cloud upon its title. The work was undertaken without a petition from the abutting property holders therefor, and, after notice of the common council's intention in the premises had been given, the plaintiff filed a remonstrance against any further proceedings with reference thereto, which was considered by the council, but disregarded.

A demurrer to the complaint having been overruled, an answer setting up the provisions of section 156 (Laws, 1898, pp. 101, 163), of the present charter as a bar to a further prosecution of the suit was filed, and, a demurrer thereto being sustained, the cause went to trial upon the facts, and a decree was rendered declaring the assessment void as it pertained to the following described adjacent property, of which plaintiff was the owner, viz.: Lots 6, 7, and 8, block 10, Wheeler's Addition; lots 3 and 4, block 69, lots 1, 2, 3, and 4, block 70, lots 1, 2, 3, and 4, block 71, and lot 4, block 43, Holladay's Addition; lot 1, block 111, East Portland; and a small tract otherwise described,—upon the ground that the work undertaken was not in fact a repair, but an original improvement, and valid as it affects the following described property of plaintiff: Frac-

tional lot 7, south of the Oregon Railroad & Navigation right of way, and lots 5 and 6, block 73; part of lot 2 and lots 3 and 4, block 111; fractional lot 2, south of the Oregon Railroad & Navigation right of way; and lots 3 and 4, block 110, East Portland,—decreeing that the work for which the assessment was made thereon was a repair, and had been regularly and properly done. This latter property abuts exclusively upon that part of Union Avenue along which the bridge extends, and constitutes more than one half of the property affected by the assessment for the repair of such bridge adjudged and decreed to be valid. Both parties appeal.

1. The work done by the common council under the denomination of a repair comprises a space of sixteen blocks and intersecting streets upon Union Avenue. It was to be carried forward as a single undertaking, and was so treated from the beginning to the time of levying the assessment upon the abutting property. The court below found that the work other than that on the bridge was not a repair, but an original improvement, which finding is in full accord with the fact, and is not questioned by counsel for the city. There was no petition for the improvement by owners of one third of the abutting property, as required by section 98 of the charter of 1893, then in force, as a prerequisite to giving notice of the proposed work, or the prosecution thereof. This was concededly a fatal defect in the proceedings, and rendered the assessment void. But it is contended here, as it was in the case of *Thomas v. Portland*, 40 Or. 50 (66 Pac. 439), that section 156 of the present charter is presently and absolutely curative of the defect, and bars further prosecution of the suit. This question was decided adversely to the defendant in that case, and it is conclusive of the contention here. This disposes of the city's appeal.

2. The improvement being unauthorized, there was nothing but the bridge repair to be made by the city. But there was a remonstrance interposed as to that work by the owner of more than one half of the adjacent property to be affected by the assessment, which was fatal to its prosecution: *Cook v.*

City of Portland, 35 Or. 383 (58 Pac. 353). The abutters could not be deprived of their remedy afforded by a remonstrance by combining with the repair an improvement extending to other parts of the avenue, which was not regularly and lawfully initiated and prosecuted to completion, and a valid assessment levied therefor. The irregularity and invalidity of the improvement proceedings left the repair to be proceeded with as if it was a separate undertaking, and, the common council having declared that the cost thereof should be assessed against the adjacent property, the remonstrance became effective, and should have been so considered by the council, and the work abandoned. The assessment for the repair was therefore also void, and the decree of the court will be reversed in so far as it validates said assessment, and one entered here in accordance with the prayer of the plaintiff, with costs in both courts. REVERSED.

Decided 28 October, 1901.

READE v. PACIFIC SUPPLY ASSOCIATION.

[66 Pac. 443.]

CONSTRUCTION OF PLEADINGS AND FINDINGS.

1. An answer in an action on a note alleged that it was made by the president and secretary of defendant corporation as a renewal note to take up one previously given to plaintiff's assignor in payment of their personal indebtedness arising out of the purchase of a patent right, which was not within defendant's objects and purposes; that defendant's board of directors never authorized or ratified the execution of either of said notes; that defendant received no benefit therefrom; and that plaintiff took the notes with knowledge of these defenses. *Held*, that a finding that the defendant's president and secretary had authority to execute and deliver the note covered the material issue presented.

CONSTRUCTION OF FINDINGS.

2. Where the pleadings in an action on a note admit that the persons who executed it were the defendant corporation's president and secretary, and that they signed the note as such, a finding that they had authority therefor is not a conclusion of law as to what they might do under the power delegated, but a finding of the fact of their authority.

IMMATERIAL FINDINGS—HARMLESS ERROR.

3. In an action on a note against a corporation, a finding that the president, one of the persons who executed the note, was the owner of the majority of the stock of the corporation, though outside the issues, is not prejudicial to the defendant, where the judgment is supported by proper findings.

NECESSITY OF FINDINGS ON INTERMEDIATE MATTERS.

4. It is sometimes necessary to pass on several subordinate and intermediate facts in reaching a conclusion as to an ultimate fact, but ordinarily it will be sufficient to make a finding on the latter, if further findings are wanted they should be asked for. This is, of course, subject to the rule that findings are imperatively necessary on all material issues.

From Multnomah: ALFRED F. SEARS, JR., Judge.

Action by E. T. Reade against the Pacific Coast Home Supply Association to recover the sum of \$500 on a promissory note alleged to have been executed by the defendant, a private corporation, with interest from November 3, 1898, at the rate of ten per cent per annum, and the sum of \$50 as attorney's fees. The answer denies that the defendant made or delivered said note, or that \$50, or any other sum, is reasonable as an attorney's fee, and contains the following averment: "And for a further and separate answer to the complaint herein defendant alleges that on or about the — day of September, 1898, at Portland, Oregon, J. R. Greenfield and M. G. A. Du Buisson purchased from the Pacific Drill Chuck Company, a corporation, of Watsonville, Santa Cruz County, State of California, a certain patent right; that as part payment upon the said patent right by them purchased the said Greenfield and Du Buisson made and delivered to the said Pacific Drill Chuck Company, a corporation, a certain pretended promissory note of the defendant corporation herein for the sum of five hundred (\$500) dollars; that the making and delivery of the said promissory note were not authorized by the board of directors of the said defendant corporation, and were without consideration moving to the defendant corporation; that the said pretended promissory note was made and delivered by the said Greenfield and Du Buisson, who were then the president and secretary of the defendant corporation, in payment of their own private debt and obligation, as the said Pacific Drill Chuck Company at said time well knew; that thereafter, to wit, on or about the — day of October, 1898, the said Pacific Drill Chuck Company transferred and delivered the said promissory note to the plaintiff herein; that the plaintiff gave

no consideration therefor, and took the same with full knowledge that it had been made and delivered by the said Greenfield and Du Buisson in payment of their own debt and obligation, and as a payment of the purchase price of the said patent right by them purchased, and with the full knowledge that the making and delivery of said pretended promissory note on behalf of the defendant corporation had not been authorized by the directors of the said defendant corporation, and that the defendant corporation had received nothing therefor; that thereafter, to wit, on the third day of November, 1898, the said J. R. Greenfield, the president of the defendant corporation, and the said M. G. A. Du Buisson, the secretary of the defendant corporation, made and delivered to the plaintiff herein the said pretended promissory note of the defendant herein, set out in the complaint, and sued on in this action, in exchange for and to take up the said prior pretended promissory note of the defendant hereinabove described; that the making and delivery of the said pretended promissory note in the complaint set out was never authorized by or ratified by the board of directors of the defendant corporation; that the defendant, as the plaintiff well knew at the time of taking the same, received no consideration therefor, and no benefit therefrom, and that the plaintiff, at the time of taking the said promissory note sued on, and at the time of taking the prior note for which the same was exchanged, knew and was fully informed of all the facts connected with the making of the said notes, and knew that the same were given by the said Greenfield and Du Buisson as a payment upon a private and individual contract of the said Greenfield and Du Buisson, in which the defendant corporation had no interest; that this defendant corporation was in no wise interested in the purchase by the said Greenfield and Du Buisson of the said patent right, and that the objects and purposes for which this defendant corporation is incorporated do not include the purchase or owning of patent rights."

The reply denies the material allegations of new matter in the answer, and contains the following averment: "Admits

that the promissory note set out in the complaint was made and delivered to the plaintiff on or about the third day of November, 1898, by the defendant corporation, through its president and secretary, but denies that said promissory note is a pretended promissory note of the defendant, and denies that the same was made in exchange for or to take up a said prior pretended promissory note of the defendant, but avers that said promissory note set out in the complaint was made by the defendant to take up a prior and valid promissory note made by it to the Pacific Drill Chuck Company, and thereafter indorsed over to the plaintiff." Upon these issues the cause was tried by the court, which found, in substance, that the defendant was and is a corporation; that on November 3, 1898, by its president and secretary, it executed to the plaintiff the note sued on; that it provided for the payment of a reasonable sum as attorney's fees in case suit was instituted to collect the same; that no part of said note had been paid; that \$50 is a reasonable sum as such fees; and found also: "(6) That said promissory note was executed and delivered to the plaintiff by the defendant in exchange for a promissory note for the sum of \$500, executed and delivered by the defendant to the Pacific Drill Chuck Company, and transferred and indorsed over to the plaintiff by said Pacific Drill Chuck Company, for valuable consideration, before maturity, and that plaintiff took said note so transferred and indorsed over to him as a *bona fide* purchaser for value. (7) That the president and secretary of the defendant corporation had authority to execute and deliver to the plaintiff the promissory note set out in the complaint herein, and that J. R. Greenfield, president of the defendant corporation, and one of the officers thereof, who executed and delivered said promissory note to the plaintiff, is the owner of the majority of the stock of said corporation, as well as the president and general manager." The court having found as a conclusion of law that the plaintiff was entitled to recover from the defendant the sum of \$553.47 and the sum of \$50 as attorney's fees, gave judgment therefor, from which the defendant appeals.

AFFIRMED.

For appellant there was a brief over the name of *Davis, Gantenbein & Veazie*, with an oral argument by *Mr. Arthur L. Veazie*.

For respondent there was a brief and an oral argument by *Mr. Milton W. Smith*.

MR. JUSTICE MOORE delivered the opinion of the court.

1. It is contended by defendant's counsel that the court erred in failing to find upon material issues and in making findings outside the issues. It is insisted that the material issues upon which no findings of fact were made arose out of the allegation that the instrument sued on was made by certain officers of the defendant as a renewal note, to take up one previously given by them in payment of their own personal indebtedness, arising out of the purchase of a patent right; that the defendant's board of directors never authorized or ratified the execution of either of said notes; that the defendant received no benefit from, and was not interested in, the purchase of the patent right; that the plaintiff took the notes with full knowledge of all these matters of defense, and that the objects and purposes for which the defendant is incorporated do not include the purchase or owning of patent rights. It is maintained by plaintiff's counsel, however, that the only material averments in the answer are that the defendant's president and secretary had no authority to make or deliver the note set out in the complaint, and that the plaintiff had knowledge and notice of such want of authority on the part of the agents; that the findings of fact follow the allegations of the complaint, and support the judgment; that the court, having found "that the president and secretary of the defendant corporation had authority to execute and deliver to the plaintiff the promissory note set out in the complaint," thereby stated the findings of fact upon all the material issues involved in the pleadings; and that, if defendant had desired findings upon the subordinate probative facts, upon which the ultimate fact found depended, the court should have been so

requested. Notwithstanding the organic act declares that in all civil cases the right of trial by jury shall remain inviolate (Const. Or. Art. I, § 17), such right may be waived by consent of the parties in the trial of an issue of fact in actions on contract, and with the assent of the court in other actions: Hill's Ann. Laws, § 218. Upon the trial of such issue by the court its decision shall be given in writing, and filed with the clerk, stating the facts found and the conclusions of law separately: Hill's Ann. Laws, § 219. The findings of the court upon the facts shall be deemed a verdict, and may be set aside in the same manner, and for like reasons, as far as applicable, and a new trial granted: Hill's Ann. Laws, § 220. It has been held that the court, without any request therefor, must make and state in writing findings of fact upon all the material issues involved: *Daly v. Larsen*, 29 Or. 535 (46 Pac. 535); *Breding v. Williams*, 33 Or. 391 (54 Pac. 206).

The rule being thus settled, it becomes necessary to examine the pleadings to determine the material issues to be tried. The answer does not deny that the defendant is a corporation, or that no part of said note has been paid, and the reply fails to deny the allegation of defendant that Greenfield and Du Buisson were its president and secretary, and admits that the note sued on was made to take up a prior note to the Pacific Drill Chuck Company. These averments of fact not being in issue, no findings of the court were required to be made thereon: *Fink v. Canyon Road Co.* 5 Or. 301; *Luse v. Isthmus Transit Ry. Co.* 6 Or. 125 (25 Am. Rep. 506). The material issues of the complaint, therefore, are that the defendant made and delivered to the plaintiff its promissory note, and that \$50 is a reasonable sum as attorney's fees. If the defendant could show that Greenfield and Du Buisson, as its president and secretary, had no authority to execute the note sued on, evidence of that character would constitute a valid defense, unless it further appeared that the note had been assigned, before maturity, to an innocent purchaser, for a valuable consideration: *Mechanics' Banking Assoc. v. New York & S. W. L. Co.* 23

How. Prac. 74. The great weight of judicial utterance in this country is to the effect that every private corporation, unless restrained by the charter, or prohibited by statute, possesses implied power to issue negotiable instruments in settlement of any debt contracted in the management of its authorized business, or reasonably incident to or connected therewith: 1 Daniel, Neg. Inst. (4 ed.) 382; 4 Thompson, Corp. § 5730; *Mott v. Hicks*, 1 Cow. 513 (13 Am. Dec. 550); *Barker v. Mechanic Fire Ins. Co.* 3 Wend. 94 (20 Am. Dec. 664); *Com. Bank of New Orleans v. Newport Mfg. Co.* 1 B. Mon. 13 (35 Am. Dec. 171); *Olcott v. Tioga R. Co.* 27 N. Y. 546 (84 Am. Dec. 298); *Richmond, etc. R. Co. v. Snead*, 19 Grat. 354 (100 Am. Dec. 670). So, too, an almost unbroken line of decisions supports the principle that, except in case of organizations such as trust or guaranty companies, a corporation possesses no power to make or indorse commercial paper for the mere accommodation of any person, or for another corporation: 4 Thompson, Corp. §§ 5721, 5739; *Carney v. Duniway*, 35 Or. 131 (57 Pac. 192, 58 Pac. 105). If, therefore, the note was given for the private debt, or in settlement of the personal obligation of Greenfield and Du Buisson, or either of them, and its execution was not authorized by the defendant's charter, it was issued without authority; or, if the note was given for the purchase or in part payment of an article that was not to be used in the legitimate prosecution of the defendant's business as specified in its articles of incorporation, or reasonably incident to or connected with the same, such note was executed without authority, and no action of its board of directors could give validity thereto. A mere averment in the answer that the note was made and delivered without authority would necessarily render admissible all evidence tending to show that it had been given in payment of the debts or obligations of the president or secretary, or that it was given for the purchase of an article not warranted by its charter; and, if such evidence had been sufficient to establish that fact to the satisfaction of the court, a finding for the defendant must have inevitably resulted, unless the note was transferred, before maturity, for

a valuable consideration, to a person who had no notice or knowledge of such want of authority on the part of the defendant's agents; for when a corporation possesses general power to issue commercial paper an *ultra vires* negotiable instrument is good in the hands of a *bona fide* purchaser for value: 4 Thompson, Corp. §§ 5736-5738, 5740. These were the only material issues in the answer upon which the court was required to make findings of fact, and, having found that the president and secretary of the defendant had authority to execute and deliver to the plaintiff the promissory note set out in the complaint, it would seem that the finding in respect to the assignment of the note was of minor importance, notwithstanding which the court also found that the Pacific Drill Chuck Company, for a valuable consideration, before maturity, assigned said note to the plaintiff.

2. It is argued by defendant's counsel that the finding "that the president and secretary of the defendant corporation had authority to execute and deliver to the plaintiff the promissory note set out in the complaint" is a conclusion of law, without any findings of fact upon which to predicate it. "The existence of an agent's authority," says Mr. Justice STRAHAN in *Glenn v. Savage*, 14 Or. 567 (13 Pac. 442), "is purely a question of fact. What he may do by virtue of it is a question of law." The pleadings admit that Greenfield and Du Buisson, at the time they executed the note in question, were the president and secretary, respectively, of the defendant. This fact, having been admitted, required no finding thereon; and, it also being admitted by the pleadings that they signed said note as president and secretary, the finding that they had authority therefor is not a finding of what they might do under the power delegated, but a finding of fact that authority existed for the performance of the facts admitted. The transcript does not contain any of the evidence introduced at the trial, and hence we are unable to say whether the fact so found was determined from an examination of the defendant's articles of incorporation, or from the record of its board of directors showing that such power had been legally granted. The

method of conferring the power was a matter of evidence admissible under the general allegations of the answer, the defendant specifically alleging the mode of granting it; and, such allegation not being material, if the defendant had desired a finding thereon, he should have so requested the court, but, not having done so, no error can be predicated thereon.

3. The court also found that Greenfield was the owner of a majority of the stock of said corporation, as well as being its president and general manager. This was outside the issues, but the defendant cannot be prejudiced thereby, for the judgment, being supported by proper findings, is not rendered invalid by extraneous findings not in conflict therewith: *Dolliver v. Dolliver*, 94 Cal. 642 (30 Pac. 4).

4. The findings upon the material issue of the authority to execute the note may have involved the existence of several subordinate issues of fact upon which the ultimate fact depended (*Moody v. Richards*, 29 Or. 282, 45 Pac. 777), but, as they were not material issues, and no request was made for findings thereon, the judgment is affirmed. **AFFIRMED.**

Argued 17 October; decided 4 November, 1901.

SHOBERT v. MAY.

[66 Pac. 466, 55 L. R. A. 810.]

RIGHT TO VERDICT OF JURY—NEGLIGENCE.

Under the Constitution of Oregon, Art. 1, § 17, providing that the right of trial by jury in all civil cases shall remain inviolate, the question of negligence must be left to the jury to determine, where the defendant has been put upon the defense, even though there may not be any conflict in the testimony.

From Multnomah: **ARTHUR L. FRAZER**, Judge.

Action in tort for personal injuries by Stephen Shobert against Levi May and others. There was a judgment for plaintiff, from which this appeal is taken. **REVERSED.**

For appellants there was a brief over the name of *Dolph, Mallory, Simon & Gearin*, with an oral argument by *Mr. Rufus Mallory*.

For respondent there was a brief over the name of *Mitchell & Tanner*, with an oral argument by *Mr. Albert H. Tanner*.

MR. JUSTICE MOORE delivered the opinion of the court.

This is an action to recover damages for a personal injury, alleged to have been caused by the defendant's negligence. The plaintiff's testimony is to the effect that on March 14, 1899, at about 5 o'clock P. M., he entered the defendants' hardware store at Portland to purchase some hinges, and being informed by a clerk that the desired articles might possibly be found in the second story, and directed to a stairway leading thereto, he proceeded in that direction, and, the day being cloudy, and having no warning of danger ahead, walked into an elevator well and fell to the cellar, breaking his leg, whereby he became permanently crippled. An employee of the defendants, as their witness, testified that the side of the elevator between which a wooden bar, one by six inches, placed about well into which the plaintiff walked has a post at each corner, three feet from the floor, is usually extended, but at the time of the injury, which was about 3 o'clock, one end of the bar was left resting on the floor. The trial having resulted in a judgment for the plaintiff in the sum of \$1,500, the defendants appeal.

The court instructed the jury, as a matter of law, to the effect that under the facts admitted the defendants were guilty of negligence. An exception to this part of the charge having been reserved, it is contended by defendants' counsel that the court erred in taking from the jury the consideration of the question of alleged negligence, while plaintiff's counsel maintained that, the facts being admitted, the defendants' negligence is conclusively inferable therefrom, and, this being so, it was the duty of the court, as a matter of law, so to instruct the jury.

Negligence, as defined by this court, is a failure to exercise that degree of care and forethought which a prudent person might be expected to use under similar circumstances: *Hurst v. Burnside*, 12 Or. 520 (8 Pac. 888); *Cassida v. Oregon Ry.*

& *Nav. Co.* 14 Or. 551 (13 Pac. 438). The degree of care necessary to be exercised under circumstances of the character here adverted to is always commensurate with the danger incident to or reasonably to be apprehended from the instrumentalities used, and is measured by the extent of the legal duty owing to the person who might sustain an injury from any neglect in the use of such agencies. In the case at bar, the defendants, having opened their store for the sale of goods, thereby impliedly solicited patronage; and the plaintiff, having accepted their invitation, was not a trespasser or mere licensee, but was rightfully on the premises by invitation of the defendants, who owed to him a legal duty, which demanded reasonably safe arrangements for the protection of their customers: *Camp v. Wood*, 76 N. Y. 92 (32 Am. Rep. 282); *Corrigan v. Elsing*, 81 Minn. 42 (83 N. W. 492). The plaintiff denied that any bar obstructed the passageway to the elevator, but, the defendants having offered testimony to that effect, it must be considered, for the purpose of determining the consequences of the instruction complained of. The bar placed at the entrance of the elevator would undoubtedly have been sufficient to prevent the defendants' customers from falling into the well, if it had extended from one post to the other; and the failure to keep it in position is not a total disregard of the duty imposed upon the defendants by the demands of the business in which they were engaged, for the bar being up at one end evidences some degree of care. If it be assumed that, to facilitate the dispatch of business, the bar had been entirely removed at the time plaintiff was injured, as he maintains it was, the question of negligence should, in our judgment, have been submitted to the jury, to determine whether, from a consideration of all the circumstances, the defendants had exercised that degree of care and forethought which the law requires. The defendants having provided a bar to prevent injury to their customers, thereby evidencing some care, at least, for their welfare, it is not the province of a court, except upon a motion for a judgment of nonsuit, or in pursuance of a request to instruct the jury to return a verdict for the defendant, to esti-

mate the degree of care which a prudent man should exercise: *Crook v. Jadis*, 5 Barn. & Adol. 909. Lord Chief Justice TINDAL, illustrating this principle, in *Vaughan v. Menlove*, 3 Bing. N. C. *468, says: "The care taken by a prudent man has always been the rule laid down; and, as to the supposed difficulty of applying it, a jury has always been able to say whether, taking that rule as their guide, there has been negligence on the occasion in question." The testimony shows that the defendants' store is about fifty or sixty feet from front to rear, and that the elevator is situated at the rear end. If the elevator were in the front part of the store, where customers usually congregate, the imminence of the danger reasonably to be apprehended would certainly require a greater degree of care to prevent injury than if it were placed in the rear of the building, where it could not reasonably be expected that customers would usually resort.

In *Philadelphia, etc. & R. Co. v. Spearen*, 47 Pa. 300 (86 Am. Dec. 544), Mr. Justice AGNEW, discussing this question, says: "There is no absolute rule as to negligence to cover all cases. That which is negligence in one case by a change of circumstances will become ordinary care in another, or gross negligence in a third. It is a relative term, depending upon the circumstances, and therefore is always a question for the jury upon the evidence, but guided by proper instructions from the court." If, therefore, there were no controversy in respect to the facts, and it was admitted, as the plaintiff testified, that the bar was entirely removed from the elevator well when he sustained the injury, we think the question of negligence should have been submitted to the jury for their consideration as to whether, in view of all the circumstances, the defendants had exercised that degree of care which the rules of law require. "It by no means necessarily follows," says Mr. Justice JOHNSON in *Ireland v. Oswego, etc. Plank Road Co.* 13 N. Y. 526, "because there is no conflict in the testimony, that the court is to decide the issue between the parties as a question of law. The fact of negligence is very seldom established by such direct and positive evidence that it can be taken from the

consideration of the jury and pronounced upon as a matter of law. On the contrary, it is almost always to be deduced as an inference of fact from several facts and circumstances disclosed by the testimony, after their connection and relation to the matter in issue have been traced, and their weight and force considered. In such cases the inference cannot be made without the intervention of a jury, although all the witnesses agree in their statements, or there be but one statement, which is consistent throughout." To the same effect, see *Railroad Co. v. Stout*, 84 U. S. (17 Wall.) 657.

There are to be found expressions of judicial utterance which at first glance would seem to support the theory adopted by the court. Thus, in *Gagg v. Vetter*, 41 Ind. 228 (13 Am. Rep. 322), Mr. Justice BUSKIRK says: "The question of negligence is one of mingled law and fact, to be decided as a question of law by the court when the facts are undisputed or conclusively proved, but not to be withdrawn from the jury when the facts are disputed and the evidence conflicting." In *Louisville & P. Canal Co. v. Murphy*, 9 Bush. 522, it is said: "When the facts are conceded upon which the question of negligence is based, it then becomes a question of law as to whether a case of negligence has been made out." Many excerpts to the same effect might be collated, but a careful examination of the cases from which they could be extracted will show that in nearly every instance the language was intended to apply either to a motion for a judgment of nonsuit, or upon a request to instruct the jury to find for the defendant. In other words, when the uncontradicted testimony and the only inference deducible therefrom conclusively shows that the plaintiff upon whom the burden of proof rests has not made out a case of negligence sufficient to be submitted to the jury, or if his negligence has contributed to the injury of which he complains, the court may take the case from the jury and decide the issue as a question of law. Mr. Chief Justice LORD, in *Durbin v. Oregon Ry. & Nav. Co.* 17 Or. 5 (17 Pac. 5, 11 Am. St. Rep. 778), discussing this question, says: "It is true that negligence is ordinarily a question of fact for the jury to

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determine from all the circumstances of the case, and that the cases where a nonsuit is allowed are exceptional, and confined to those, as here, where the uncontradicted facts show the omission of acts which the law adjudges negligent." See, also, *McBride v. Northern Pac. R. Co.* 19 Or. 64 (23 Pac. 814); *Blackburn v. Southern Pac. Co.* 34 Or. 215 (55 Pac. 225). This is as far as the rule ought reasonably to be extended, and in cases where the negligence of the defendant is to be determined, notwithstanding there may be no conflict in the testimony, that party, in our judgment, is entitled, under the organic law of the state (Const. Art. I, § 17), to the verdict of a jury, unless waived, to the effect that he has not exercised that degree of care that the law exacts under all the circumstances of the case, before he can be compelled to respond in damages.

Other exceptions were taken and allowed, but the matters excepted to, if prejudicial error was thereby committed, can probably be avoided at a retrial of the cause. For the error in giving the instruction complained of, the judgment is reversed, and a new trial ordered. REVERSED.

Argued 22 October; decided 4 November, 1901.

FELLER v. FELLER.

[66 Pac. 468.]

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JUSTICE'S COURT—APPEAL—WRIT OF REVIEW.

1. Where the remedies by appeal and review are concurrent the initiation of an appeal is not an election of the remedies, but the appeal may be abandoned before being perfected and the other remedy adopted.

VERDICT IN REPLEVIN.

2. In replevin actions the verdict must cover all the material issues made by the pleadings or it cannot stand; thus, under allegations of ownership and right to possession, a verdict finding the right to possession but not the right of ownership, will not support a judgment: *Yick Kee v. Dunbar*, 20 Or. 416, followed.

From Marion: REUBEN P. BOISE, Judge.

Action by Francis Feller against Angie L. Feller before a

justice of the peace. From a judgment of the circuit court reversing a judgment of the justice's court, defendant appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. J. C. Johnson*.

For respondent there was a brief and an oral argument by *Messrs. John A. Carson and Loring K. Adams*.

MR. JUSTICE WOLVERTON delivered the opinion of the court.

The defendant instituted an action in the Justice's Court for Woodburn District, Marion County, Oregon, against plaintiff herein and W. F. Feller and H. Bock, alleging that she was the owner and entitled to the possession of "one cow, Holstein breed, black in color, with white spots, aged about nine years, and named 'Blackey,' of the value of \$45," and that the defendants in that action unlawfully took and detained said cow from her possession. A trial was had in the justice's court, and the following verdict returned: "We, the jury duly impaneled and sworn to try the within cause, do find that the plaintiff, Angie L. Feller, is entitled to the immediate possession of one cow, Holstein breed, black in color, with white spots, age about nine (9) years, and named 'Blackey,' as described in the complaint, and also entitled to damages in the sum of (\$42) forty-two dollars." Upon this verdict a judgment was rendered November 21, 1899, from which they attempted to appeal to the circuit court, by serving and filing a notice thereof in due time, with a proper undertaking; and the justice's docket shows that the appeal was allowed, and a stay of proceedings ordered. On December 16 a transcript on appeal was certified and delivered to the attorneys for the defendants in the justice's action. On January 15, 1900, Francis L. Feller, as plaintiff, filed a petition in the circuit court for a writ of review, which being duly issued and served, the justice of the peace in obedience thereto returned the writ to the circuit court on the twenty-ninth of the same month, with a

certified record of the proceedings had before him, in pursuance of the statute made and provided in such cases, whereupon Angie L. Feller, as defendant in this proceeding, filed a motion to dismiss the writ for the reason that an appeal had been taken in the same cause, and was then pending in the circuit court. But, it being made to appear that the said transcript had not been filed in the circuit court, the motion was denied, the judgment of the justice's court reversed, and the cause remanded for such further proceedings as might be deemed proper in the premises. From this judgment the defendant in the writ appeals.

Two questions are involved in the controversy: (1) Whether a review will lie to bring up the record of a justice's court after an appeal has been regularly taken, the proceedings therein stayed, and a transcript certified and delivered to the appellant, but not filed in the circuit court; and (2) was the verdict of the jury sufficient upon which to base the judgment rendered?

1. To fully understand the situation, it is necessary to refer somewhat in detail to the statute governing appeals from a justice's court, and the special proceeding by writ of review. An appeal is taken either by giving oral notice thereof in open court at the time of the rendition of the judgment, or by serving a notice on the adverse party within thirty days thereafter, and filing the original, with proof of service thereon, with the justice, and by giving an undertaking for the costs and disbursements of the appeal. When the appeal is taken the justice must allow the same, and make an entry in his docket stating whether the proceedings are thereby stayed or not. On or before the first day of the term of the circuit court next following the allowance of the appeal, the appellant must cause to be filed with the clerk of the circuit court a transcript of the cause. Upon the filing of the transcript with the clerk of the circuit court the appeal is perfected, and thenceforth the action shall be deemed pending and for trial therein as if originally commenced in such court, and it shall have jurisdiction of the cause, and shall proceed to hear, de-

termine, and try the same anew, disregarding any irregularity or imperfection in form which may have occurred in the proceedings in the justice's court: Sections 41, 42, and 47 of "An act to regulate the practice and proceedings in justice's courts," approved February 17, 1899 (Sess. Laws, 1899, p. 109). As it pertains to the writ of review, it is provided that: "The writ shall be concurrent with the right of appeal, and shall be allowed in all cases where the inferior court, officer, or other tribunal, in the exercise of judicial functions, appears to have exercised such functions erroneously, or to have exceeded its or his jurisdiction, to the injury of some substantial right of the plaintiff, and not otherwise. The writ shall be directed to the court, officer, or tribunal whose decision or determination is sought to be reviewed, or to the clerk or other person having the custody of its records or proceedings, requiring it or him to return said writ to the circuit court, and not elsewhere, within a time therein specified, with a certified copy of the record or proceedings in question annexed thereto, that the same may be reviewed by such circuit court, and requiring the defendant to desist from further proceedings in the matter to be reviewed. The words in a writ requiring a stay of proceedings may be inserted or omitted in the discretion of the court or judge issuing the same, and the proceeding shall be stayed or not, accordingly": Hill's Ann. Laws, §§ 586, 587, 588.

It would seem not to have been the purpose of either of these acts, by the process thereby provided and established for removing a cause to the circuit court, to break up or suspend the judgment of the lower court; and such judgment can only be stayed in the one case by the undertaking, which operates as a supersedeas, and in the other by the direction of the circuit court. This is analogous to the practice and procedure as it pertains to appeals from the circuit court to the supreme court: *Day v. Holland*, 15 Or. 464 (15 Pac. 855); *Nessley v. Ladd*, 30 Or. 564 (48 Pac. 420). In this connection we may state a fact of which the court takes judicial knowledge, namely, that the first term of the circuit court for Marion

County, after the appeal was taken, began Monday, February 12, 1900, and the hearing upon the writ of review seems to have been had therein at an adjournment of the preceding regular term. It is clear, from the statute cited, that the circuit court does not obtain jurisdiction by appeal, except upon the filing of the transcript. When that is done, the appeal is deemed perfected and pending for trial, as if originally commenced therein, and such court is thenceforth clothed with jurisdiction in the premises. Unless the appellant files the transcript on or before the first day of the next term following the allowance of the appeal, the circuit court does not acquire jurisdiction of the cause. Such is the effect of two decisions of this court involving a similar statute: *State v. Zingsem*, 7 Or. 137; *Steel v. Rees*, 13 Or. 428 (11 Pac. 68). In this latter case the appellant took, as here, all needful steps to entitle him to enter the cause in the circuit court, but omitted to do so; and the respondent attempted to file the transcript, and thus complete the appeal, with a view of having the judgment affirmed, and fixing the liability of the sureties. But it was held that the filing of the transcript by the respondent was a nullity, and that at most he could only have an action on the undertaking for damages suffered by the stay of proceedings that had been procured.

The statute pertaining to the writ of review, prior to the amendment of 1899, now in force, provided that the writ should be allowed in all cases "where there is no appeal, or other plain, speedy or adequate remedy," touching the effect of which, as affording a remedy concurrent with the right of appeal, there have been conflicting adjudications in this court, a summary of which is given by Mr. Justice STRAHAN in *Ramsey v. Pettingill*, 14 Or. 207, 208 (12 Pac. 439). He says: "One case decided that appeal and review were concurrent remedies: *Schirott v. Phillippi*, 3 Or. 484, following *Blanchard v. Bennett*, 1 Or. 329. In *Evans v. Christian*, 4 Or. 375, this court held that appeal and review were not concurrent remedies, and to that extent overruled the preceding cases on that subject. In the latter case it was further said: 'We do

not question the correctness of the decision of the court in *Schirott v. Phillippi*, so far as it determined the real question in that case. That was that a writ of review might issue in a case (otherwise proper) when the right to an appeal once existed, but had been lost by the lapse of time.' '' And it was finally settled by that case that Title I, c. 7, of the Code of Civil Procedure, relating to the writ of review, authorized review only "where there is no appeal," and when the right of appeal from a judgment of a justice's court had been lost by lapse of time a writ of review did not lie. See, also, *Summers v. Harrington*, 14 Or. 480 (13 Pac. 300). These cases seem to have settled the law prior to the amendment that appeal and review were in no sense concurrent remedies, and that if the appeal had once existed a review would not lie. The amendment omits the words of the old statute, "where there is no appeal or other plain, speedy or adequate remedy," and declares that "the writ shall be concurrent with the right of appeal, and shall be allowed in all cases" where the inferior court has exceeded its jurisdiction, etc. That there was a purpose to make a radical change with respect to the concurrent feature of the procedures, and to overturn the prior statute and practice, is perfectly manifest; and that the effect of the change was to give concurrent remedies has been decided by *Hill v. State*, 23 Or. 446 (32 Pac. 160), and followed in *Kirkwood v. Washington County*, 32 Or. 568 (52 Pac. 568); *Fanning v. Gilliland*, 37 Or. 369 (61 Pac. 636, 62 Pac. 209); and yet there is a question touching whether the two remedies may be prosecuted at the same time. This question, however, is not presented in its fullest aspect in the record before us.

The only one which we may now consider is whether, after the appellant has filed the notice of appeal and undertaking, and secured a stay of proceedings in the justice's court, and an issuance and certification of the transcript, he can rest there, and, without filing such transcript in the circuit court, sue out a writ of review, and have it heard and determined, notwithstanding he has initiated the appeal. It seems clear that as the circuit court has not acquired jurisdiction of the appeal,

the cause having not yet been removed thereto by that proceeding, it had jurisdiction to allow the writ of review, and to remove the cause from the justice's court by that procedure. If the appeal had been perfected by filing the transcript, another question would have been presented, to which the argument of counsel would have been pertinent,—whether the circuit court could ignore it and entertain jurisdiction of the same cause under another proceeding. But by what we have said or shall say we do not wish to be understood as passing upon that question, because it is not involved by the record. Nor does the case of *Fanning v. Gilliland*, 37 Or. 369 (61 Pac. 636, 62 Pac. 209), go so far, as the remedies by appeal afforded to the losing party in the lower court therein were in no measure inconsistent. The purposes of the review and the appeal in the assessment of damages are to reach entirely different results. If the plaintiff herein had waited until after February 12 without filing the transcript of the cause on his appeal, he would then have been entitled to the writ, as the appeal would have been deemed abandoned, and the distinct purpose of the amended statute, when the old statute and decisions respecting it are considered, was to give a right of review by the writ, notwithstanding the right of appeal once existed and was lost. The effect could not be different if the plaintiff had failed to prosecute an appeal where one is given, or, having initiated it, failed to perfect the same by filing the transcript: *Poag v. Rowe*, 16 Tex. 590. And it may be safely predicated that the present statute even goes further than this, and that a party is given his choice of remedies, and may pursue the one or the other at his option.

2. As respects the other question, it is alleged in the complaint that the plaintiff is the owner and entitled to the possession of the personal property, which is denied by the answer. The finding of the jury is that the plaintiff is entitled to the immediate possession and damages in a sum designated. Just such a verdict, under like allegations, was rendered in the case of *Yick Kee v. Dunbar*, 20 Or. 416 (26 Pac. 275), and it was held insufficient to support the judgment, as it did not

pass upon a material issue in the cause, namely, the ownership of the specific personal property involved; the rule being, in actions for the recovery of personal property, that the verdict should be responsive to and dispose of all the material matters put in issue by the pleadings. The defect was considered to be one of substance and vital to a recovery, and the verdict was therefore rendered insufficient to support a judgment that the plaintiff was such owner and entitled to possession. The case is in harmony with prior decisions upon the same subject: *Jones v. Snider*, 8 Or. 127; *Phipps v. Taylor*, 15 Or. 484 (16 Pac. 171); *Smith v. Smith*, 17 Or. 444 (21 Pac. 439). Nor does *Corbell v. Childers*, 17 Or. 528 (21 Pac. 670), conflict with this holding, as the verdict in that case was construed to be a finding "for the plaintiff," and that he was entitled to the immediate possession and return of the property; the finding "for the plaintiff" being deemed equivalent to a finding as to ownership and right of possession. The allusion made by the jury by the use of the phrase "as described in the complaint" has reference to the identity of the property, and does not serve in any measure to indicate a finding as to plaintiff's right of ownership.

It follows that the judgment of the court below should be affirmed, and it is so ordered. AFFIRMED.

Argued 28 October; decided 12 November, 1901.

BROCK v. WEISS.

[66 Pac. 575.]

CUMULATIVE EVIDENCE—HARMLESS ERROR.

1. Where evidence on a collateral matter has been received without objection, and remains uncontradicted, it is harmless error to subsequently admit cumulative evidence on the same subject.

PRESUMPTION AS TO EFFECT OF ERROR.

2. Error will not be presumed to have been harmless, but where all the testimony is brought up and it appears therefrom that appellant has not been injured, the judgment should not be reversed for such error: *Kreuson v. Purdom*, 15 Or. 589, and *State ex rel. v. Kraft*, 18 Or. 550, applied; *Townley v. Oregon R. Co.* 33 Or. 323, distinguished.

From Washington: THOS. A. McBRIDE, Judge.

Action by Mary Maggie Halter Brock against John G. Weiss. From a judgment in favor of plaintiff, defendant appeals. **AFFIRMED.**

For appellant there was a brief and an oral argument by *Messrs. Samuel B. Huston and Alfred R. Mendenhall.*

For respondent there was a brief and an oral argument by *Mr. W. N. Barrett.*

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is an action upon a promissory note for \$300, of date February 25, 1895, due three years after date, alleged to have been made, executed, and delivered by the defendant to one John Brock, and by him assigned and transferred to the plaintiff, for value, before maturity. The answer denies the execution and delivery of the note to Brock and its assignment to plaintiff, and, for a further and separate defense, alleges that on February 25, 1895, the defendant, who was about to depart for Germany on a visit, and desired to make his friend John Brock a present in the event of his death during his absence, executed the note upon which this action is founded, and put it in a sealed envelope at a place known to Brock, with the direction and agreement that, if he should die while on such visit, Brock should open the envelope and its contents should become his property, but, if defendant returned, the gift should be of no effect; that he did return in due time, but during his absence, and without his knowledge or consent, and contrary to the agreement, Brock wrongfully and unlawfully obtained and opened the envelope, took possession of the note, and transferred it to the plaintiff, who is his wife, and who brings this action at his request. The reply puts in issue the new matter alleged in the answer, and avers affirmatively that the note was given by defendant to Brock in payment for services rendered and labor performed by the latter during a period extending from about January 1, 1893, to July 1, 1896,

and that in June, 1896, and before the maturity of the note, Brock, for value, assigned and delivered it to the plaintiff, who is the owner and holder thereof. The plaintiff had judgment, and defendant appeals.

1. Upon the trial the plaintiff testified, among other things without objection, that she was married to Brock in January, 1896, and lived with him as his wife until the last of June of that year, when he deserted and abandoned her, since which time he has continued to live separate and apart from her; that before leaving he assigned and transferred to her the note in question for the support of the child which was subsequently born to them, and which she has been supporting since its birth by working out. The defendant gave testimony tending to support his defense, whereupon the mother of plaintiff, Mrs. Christenz Halter, was called in rebuttal, and testified, among other things, over the objection and exception of defendant, that her daughter had been supporting her child by doing general housework for wages. The admission of this testimony is the only assignment of error on this appeal. But it related to a mere collateral matter, and, as already stated, testimony by the plaintiff to the same effect was given as a part of her case in chief without objection by the defendant, either at the time of its admission or at any subsequent stage of the trial, and it was not controverted. It appeared, therefore, as an uncontradicted fact, from testimony admitted without objection, that the plaintiff supported her child by her own labor; hence the admission of the cumulative testimony of Mrs. Halter, if technical error, was manifestly harmless. The evidence on this subject was presumably admitted for the purpose of tending to show that the plaintiff had received the note from her husband in good faith, for the support of her child, and that she had kept and performed the agreement under which it was assigned to her. But, if it was incompetent, its admission was not, under the circumstances, reversible error.

2. It is true, where error is shown it will not be presumed that it was rendered harmless unless it so appears from the record. In this case, however, all the testimony given on the

trial is made part of the bill of exceptions, and from its examination we fully concur in the view of the trial court that the verdict ought not to be disturbed on account of the admission of the testimony complained of: *Krewson v. Purdom*, 15 Or. 589 (16 Pac. 480); *State ex rel. v. Kraft*, 18 Or. 550 (23 Pac. 663); *Townley v. Oregon R. Co.* 33 Or. 323 (54 Pac. 150). It follows that the judgment be affirmed, and it is so ordered.

AFFIRMED.

Argued 30 October; decided 12 November, 1901.

DEAN PUMP WORKS v. ASTORIA IRON WORKS.

[66 Pac. 605.]

40	83
44	574
40	83
48	395

SALES—BREACH—MEASURE OF DAMAGES.

Plaintiff was a sole manufacturer of exhaust steam condensers, but its goods were made for sale in open market, and had a readily ascertainable market value. Defendant wrote for data concerning condensers for engines of a certain size. Plaintiff replied that the specifications given were insufficient, but sent a general price list. Defendant then entered into contracts to furnish condensers to two steamships, and ordered condensers of a certain size from plaintiff, which sent a smaller size. Defendant received these, but refused to accept them as a compliance with its order, and subsequently ordered others of a larger size than any yet specified. *Held*, that defendant's set-off for non-compliance with its first order was limited to the difference between the market value of the condensers first ordered and those sent in response, and was not the difference between those so received and those afterwards ordered to fulfill its collateral contracts with the shipowners.

From Clatsop: THOS A. McBRIDE, Judge.

Action for the price of goods sold by the Dean Bros. Steam Pump Works, a corporation, against the Astoria Iron Works, a corporation. From a judgment in favor of defendant, plaintiff appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Chas. R. Thomson*.

For respondent there was a brief over the name of *Fulton Bros.*, with an oral argument by *Mr. Chas. W. Fulton*.

MR. CHIEF JUSTICE BEAN delivered the opinion of the court.

The plaintiff is engaged at Indianapolis, Indiana, in the business of manufacturing and selling combined air pumps, circulating pumps, and condensers, such as are used in steamboats for condensing the exhaust steam. The condenser consists of a metal cylinder, containing small tubes, usually five eighths or three quarters of an inch in diameter, through which cold water is passed by means of the circulating pump, the steam which is let into the spaces inside the condenser and surrounding the tubes being thereby condensed into water. The air pumps are used to supply the interior of the condenser with air, by means of which the water is returned to the boiler. The capacity of a condenser is determined by the square feet of tube or cooling surface. The defendant is an Oregon corporation, engaged in manufacturing, furnishing, and supplying machinery, pumps, engines, boilers, and other appliances for use in steamboats, mills, etc. On November 15, 1897, it wrote to the plaintiff, stating, in substance, that it had had several inquiries for combined air pumps, circulating pumps, and condensers, giving dimensions of engines, and asking plaintiff to give full data, "either number and length of tubes or square feet of cooling surface, diameter and stroke of engines and pumps," etc. On November 27 the plaintiff answered, saying there was not sufficient data in defendant's letter from which to calculate the steam consumption and size of condenser required, but quoted the following prices, f. o. b. Indianapolis, for pumps and condensers:

H. P. of eng.	Feet tubes.	Size of air and circulating pumps.	Approx. dimen.			Price.	Weight about—
			Lgth.	Wdth.	Ht.		
50	80	5½x 6 & 6x 5	96	14	36	\$ 265	880 lbs.
100	160	7 x 8 & 8x 7	96	18	52	465	1,800 "
150	240	7 x 8 & 8x 7	96	22	56	570	2,400 "
200	320	8 x 9 & 9x10	122	22	60	706	4,000 "
250	400	8 x 9 & 9x10	122	24	62	735	4,500 "
300	480	10 x12 & 12x12	130	24	68	950	5,600 "

On January 24, 1898, the defendant ordered of plaintiff, referring to prices and dimensions given in its letter of November

27, "one of your 5½x6 and 6x5 pumps, and condensers," and on February 28 wired it to "duplicate our order of January 24, and ship as soon as possible." On February 15 the defendant entered into contracts with the steamers Juneau and Maggie to furnish each of them "one combined circulating pump, air pump, and condenser, steam 5½ inches, water 6 inches, air 6 inches, stroke 5 inches, condenser to contain about 200 square feet of cooling surface." A short time thereafter the condenser ordered by the defendant on the twenty-fourth January, and which it intended for use in the Juneau, arrived, but, instead of being ninety-six inches in length, as stated in the plaintiff's letter of November 27, it was only fifty-four inches long, and its capacity (one hundred square feet of cooling surface) was wholly insufficient to comply with defendant's contract with the Juneau. The condenser ordered by wire February 28, which the defendant intended for use in fulfilling its contract with the Maggie, arrived soon afterwards, but was only fifty-four inches long, and contained eighty-eight square feet of cooling surface. Upon the arrival of the condensers, defendant accepted the same, but immediately notified plaintiff that they did not comply with the contract, and requested it to ship condensers at once "in accordance with dimensions given November 27," which the plaintiff refused to do, asserting that, because the condensers shipped contained more cooling surface than those ordered, there had been no breach of the contract. Defendant subsequently ordered of plaintiff two condensers of the "next larger size," with which to fill its contracts with the steamers Juneau and Maggie, at an expense of \$510. This action is brought to recover a balance of \$400 alleged to be due from the defendant to the plaintiff on account of the condensers purchased.

The complaint is in the usual form in actions for goods sold and delivered, and the controversy arises upon the counterclaim of the defendant. The answer sets up, in substance: That plaintiff offered and agreed to sell and deliver to defendant, f. o. b. Indianapolis, Indiana, combined steam, air, and circulating pumps and condensers, of the following descrip-

tion, size, and dimensions: "Pumps, 5½ inches by 6 inches and 6 inches by 5 inches; condensers, 96 inches long, 14 inches wide, and 36 inches in height; weight, 880 pounds,—for the sum of \$265." That, relying upon such agreement, defendant entered into contracts to furnish each of the steamers Juneau and Maggie a combined circulating steam and air pump and condenser of the size and weight as stated. That thereupon it ordered of plaintiff two of such pumps and condensers, but that plaintiff failed and neglected to comply with its contract, in this: that it did not furnish a condenser ninety-six inches, but only fifty-four inches, long, which weighed one thousand four hundred and seventy pounds. That by reason thereof both of said condensers were entirely worthless, and of no value whatever to defendant. That it immediately notified plaintiff of the failure to comply with its contract, and demanded that it furnish two condensers ninety-six inches in length, which it refused to do. That at the time of the contract plaintiff had full knowledge that defendant had agreed to furnish each of the steamboats referred to with ninety-six-inch condensers, and also knew, and defendant alleges the fact to be, that it could not purchase such condensers elsewhere; and that plaintiff wholly refused to deliver and furnish them unless it agreed to pay the further sum of \$510, which it was compelled to do in order to fulfill its contracts to supply the steamboats. That, by reason of the failure and refusal of the plaintiff to deliver the two pumps and condensers ninety-six inches in length, in accordance with its agreement, defendant was and is damaged in the sum of \$510, and because the combined weight of the pumps and condensers was more than one thousand seven hundred and sixty pounds, namely, five thousand four hundred and twenty pounds, defendant was compelled to and did pay \$54.90 freight, in which sum it asserts it is further damaged.

The plaintiff requested the court to instruct the jury that, "if plaintiff agreed to sell defendant a certain kind of a condenser, and delivered to defendant a different kind of a condenser, which is not accepted by defendant as performance of

the contract, the measure of damages is the difference in value between the condenser agreed to be delivered and the one actually delivered, if the one actually delivered is of less value than the one agreed to be delivered;" and that in ascertaining the amount of the damages, if any, to the defendant, it had "no right to consider any collateral contract made by defendant with the others for the sale of condensers, nor the amount actually paid or incurred by defendant in order to fulfill such collateral contract." The court refused to give either of the instructions requested, but charged the jury that, if the plaintiff knew, or had reasonable grounds to believe, that the condensers were purchased by the defendant, not for the purpose of general sale on the market, but to fill a particular contract, and it did not send what was ordered, or substituted something else that would not fill such contract, it would be liable in damages for any sum defendant was compelled to pay in order to fulfill its collateral contract; that, if plaintiff substituted a fifty-four-inch for a ninety-six-inch condenser, and thereby put defendant in a position where it would not be able to fulfill its contract, or had to spend money in order to do so, plaintiff would be liable for whatever it cost defendant to buy another condenser to supply the place of the one plaintiff should have furnished; that, if the ninety-six-inch condenser ordered would not have filled the defendant's contracts, and it was compelled to buy one of some other capacity for that purpose, it would be entitled to offset the difference in value between the condenser actually furnished and the one purchased; that, if there has been a breach of the contract, the fair measure of damages would be to require the defendant to pay the value of the two condensers received by it, allowing as offset any extra expense it was put to in order to obtain others to supply their places, that if plaintiff did not send the condensers ordered, and defendant had to purchase others to supply their places, it is entitled to credit in this action for the difference between the value of the condensers ordered and what it was compelled to pay for the new ones. The verdict and judgment were for the defendant, and plaintiff appeals.

Although there are several assignments of error, all involve the single question as to whether the court erred in permitting defendant to give in evidence the amount it was compelled to pay in order to fulfill its contracts with the Juneau and Maggie and instructing the jury, in effect, that, if the plaintiff did not furnish condensers of the length ordered, the measure of damages would be the difference between the value of those actually sent and what defendant was compelled to pay for others to comply with its collateral contracts. The general rule is not questioned that in cases of this kind, where the goods are not received by the vendee as in fulfillment of the contract, the measure of damages is the difference between the market value of the goods actually delivered and accepted and those ordered. The defendant contends, however, that this case forms an exception to the general rule, because the condensers were of a special manufacture, ordered for a particular purpose, and could not be had in the open market, and plaintiff knew at the time they were ordered that defendant desired them for the purpose of fulfilling its contracts with the Juneau and Maggie. But the facts of the case do not bring it within the exception contended for. It is true the condensers were of a special manufacture, but they were such as were manufactured by plaintiff for sale in the open market, were described in its catalogue, and had a value readily ascertainable. Moreover, the evidence which is contained in the correspondence between plaintiff and defendant shows that plaintiff did not, and had no reason to, believe that defendant desired the condensers to fulfill any particular contract it had, or which it contemplated making, and therefore there could be no warranty, express or implied, that they would do so. True, in its letter of November 15, asking for prices, it gives the dimensions of the engines for which it probably desired the condensers, but plaintiff declined to give any estimate of the size required because of the insufficiency of the data, and simply forwarded to the defendant a list price of half a dozen condensers of different sizes and capacities, from which to make its own selection. The defendant concluded that the smallest

condenser noted on the list, containing eighty feet of tube surface, would answer its purpose, and, after ordering it, entered into the contracts with the Juneau and Maggie which form the basis of its claim for damages. These contracts do not call for condensers of the dimensions ordered from the plaintiff, but for condensers containing two hundred feet of cooling surface, without any specifications whatever as to their size. If then, the condensers received by the defendant had been of the size and dimensions ordered, they would not have been of sufficient capacity to comply with defendant's collateral contracts. While the plaintiff agreed to furnish condensers approximately ninety-six inches long, and failed to do so, for which it is liable in damages to the defendant, yet the number of feet of cooling surface was also stated, and was less than one half that required in defendant's contracts with the steamboats. So that, if plaintiff had furnished the condensers as ordered, they could not have been used by the defendant in fulfilling its contracts, which is evidenced by the fact that, after their receipt, and after defendant knew their length, it did not order others of the size and dimensions contained in its first order, but of the "next larger size," containing, according to the price list furnished by the plaintiff, one hundred and sixty feet of cooling surface.

If defendant had contracted to furnish condensers of the dimensions ordered from the plaintiff, and was unable to fulfill its contract because of plaintiff's default, or, if plaintiff had known that defendant intended them for use in the Juneau and Maggie, and had agreed to furnish them with that understanding, a different question from the one now before us would have been presented, and a different rule of damages would, perhaps, have been applicable. But here defendant's collateral contracts were not for condensers of the dimensions ordered, and plaintiff did not know that it desired them for any particular use. We are of the opinion, therefore, that the rule sought to be invoked by the defendant, that where machinery is ordered for a special purpose, and the seller has knowledge of that fact, but fails to comply with the order, the ven-

dee, after notice to the vendor, may replace it with other suitable machinery and charge the extra expense, if any, to the vendor, can have no application to the facts of this case; and, as there was no alteration or change in the condensers to bring them up to the size and dimensions ordered, the true measure of damages, in addition to the extra freight on account of the misstatement as to the weight, is the difference, if, any, between the value of the condensers delivered and those ordered: *Canon City Electric Light & Power Co. v. Medart Patent Pulley Co.* 11 Colo. App. 300 (52 Pac. 1030). We are of the opinion, therefore, that the court was in error in the admission of the testimony as indicated and in instructing the jury as to the measure of damages.

The judgment must therefore be reversed, and a new trial ordered.

REVERSED.

Argued 30 October; decided 18 November, 1901.

HERREN'S ESTATE.

GATCH v. SIMPSON.

[66 Pac. 688.]

40	90
40	356
40	457

RIGHT OF ADMINISTRATOR DE BONIS NON TO SUE.

1. Under Hill's Ann. Laws, §§ 1098, 1099, providing that on the death or removal of an administrator a new one shall be appointed, who shall be entitled to the exclusive administration of the estate, and to maintain any necessary action against the administrator ceasing to act, or against his sureties or representatives, an administrator *de bonis non* may recover from the representative of the former administrator or his sureties assets converted by the first administrator.

POWER TO COMPEL ACCOUNTING BETWEEN ADMINISTRATORS.

2. Under Hill's Ann. Laws, § 985, giving the county court exclusive jurisdiction over the accounts of administrators, etc., and section 1078, providing that the mode of proceeding in the county court is in the nature of a suit in equity, and its jurisdiction of the parties is obtained by citation, the county court has jurisdiction of a suit by an administrator *de bonis non* to compel the representative and sureties of the first administrator, who had died, to settle the accounts of their principal.

ACCOUNTING BY ADMINISTRATOR—BURDEN OF PROOF.

3. Where, in a suit by an administrator *de bonis non* against the representative and sureties of the deceased administrator, it is shown that a certain sum was in such administrator's hands when his last report was made, the burden of proof is on the representative and sureties to show the proper administration of such fund.

From Marion: REUBEN P. BOISE, Judge.

This proceeding was instituted in the county court by Claud Gatch, administrator *de bonis non* of the estate of W. J. Herren, deceased, against M. W. Hunt, administrator of the estate of J. J. Shaw, deceased, the former administrator of the Herren estate, and against the sureties on Shaw's bond, to require the former to file the papers and vouchers in his possession showing the disbursements made by his intestate, and the latter to make final settlement of their principal's accounts. The petition alleges, in substance, that on the twenty-ninth of April, 1891, Shaw was appointed administrator of the Herren estate by the county court of Marion County; that he qualified by giving a bond as required by law, with the defendants Hubbard, Simpson, and Albert as sureties; that thereafter he disposed of all the property of the estate, except four lots in Astoria, appraised at \$4,000, and received therefor \$11,462.64; that prior to the twenty-sixth of April, 1894, he disbursed as such administrator the sum of \$8,981.15, and on that day filed his semiannual account, which was approved by the county court, showing a balance on hand of \$2,481.49, applicable to the payment of claims and expenses; that the court ordered and directed him to pay a dividend of ten per cent. on the approved claims; that the petitioner is advised and believes that such dividend was paid to some of the claimants, but he has no knowledge as to the number thereof; that, after the filing of his semiannual account on April 26, 1894, Shaw made no further report to the court showing the condition of the estate; that he died on June 24, 1898, without having fully administered the same; that the only property belonging to the Herren estate is that at Astoria and the balance due from Shaw; that since his appointment the petitioner has demanded of Hunt, the administrator of the Shaw estate, that he make and file a statement showing the amount of money paid by his intestate under the order of April 26, 1894, so far as he can from the records and vouchers in his possession, and of Simpson, Albert, and Hubbard that they make and file a state-

ment of Shaw's administration of the Herren estate, but they have failed and refused to comply with such demand. A demurrer to this petition on the grounds that the court was without jurisdiction and that the petition did not state facts sufficient to constitute any cause of suit or proceeding being overruled, Hubbard, Simpson, and Albert filed a joint answer denying the allegations of the petition, and Hunt filed a statement of the receipts or vouchers, which, upon their face, purported to be payments, made by Shaw in the administration of the Herren estate, amounting in the aggregate to \$923.09. Upon the trial the county court found from the records and papers of the estate and from the evidence offered at the hearing that Shaw had in his possession, after allowing credit for all payments made to creditors, commissions, and attorney fees, the sum of \$1,136.46, the property of the estate, for which he should be charged, with interest at the rate of eight per cent. per annum, less credit for taxes paid to be deducted from the interest, leaving the sum of \$1,280.72 due on the fourth of June, 1899, and entered an order settling and allowing his final account on that basis. An appeal was taken to the circuit court, where the decree of the county court was affirmed, and Hubbard, Simpson, and Albert, Shaw's sureties, appeal to this court.

AFFIRMED.

For appellants there was a brief over the names of *John A. Carson*, *W. T. Slater*, and *Wm. M. Kaiser*, with an oral argument by *Messrs. Carson and Kaiser*.

For respondent there was a brief over the names of *Ramsey & Bingham*, and *Bonham & Martin*, with an oral argument by *Messrs. Geo. G. Bingham and Benj. F. Bonham*.

MR. CHIEF JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

1. It is first contended that the petitioner had no authority to institute this proceeding. At common law the authority of an administrator *de bonis non* extended to only such of the

estate of the deceased as remained unadministered or unconverted by his predecessor. He could not maintain an action to recover converted assets, but that right belonged to the heirs, legatees, creditors, or others interested in the estate: 2 Woerner, Administration (2 ed.), § 536; *Bradshaw v. Commonwealth*, 3 J. J. Marsh, 632. But, as Mr. Woerner points out, the historical justification of this rule, however valid in England, does not exist in this country, and therefore many of the states have discarded the rule itself, either by judicial authority or by statutory enactments. And this is true in this state. The statute provides that whenever all the executors or administrators die, resign, or are removed, administration of the estate remaining unadministered shall be granted to those next entitled, if they be competent and qualified; and that the new administrator "is entitled to the exclusive administration of the estate, and for that purpose may maintain any necessary and proper action, suit, or proceeding on account thereof, against the executor or administrator ceasing to act, or against his sureties or representatives": Hill's Ann. Laws, §§ 1098, 1099. The plain purpose of these provisions is that the assets of an estate shall always be in the hands and under the control of an acting executor or administrator, and subject, in the manner designated by law, to the jurisdiction and supervision of the county court. To this end it contemplates that when an executor or administrator dies, or is removed, all the property in his hands belonging to the estate shall pass to his successor, and such successor is given power and authority to maintain all proper actions, suits, or proceedings to secure the possession thereof. Assets which have been converted into money are none the less still unadministered within the meaning of the law, and an administrator *de bonis non* may under the statute proceed against the former administrator or his sureties to recover the amount thereof. This seems to be the general trend of the authorities in this country, independently of statute. See 2 Woerner, Administration (2 ed.), § 352. But we are not without direct judicial authority on the question in hand. The statute of Kansas (Gen. St. 1889,

§ 2810) is substantially the same as ours, and the supreme court of that state held that it gives a substituted administrator the right to maintain an action against his predecessor as well as against the sureties upon his bond, to recover the converted assets: *Davis v. Clark*, 58 Kan. 454 (49 Pac. 665). In Iowa the statute is not nearly so explicit as ours, but simply provides that in case of a vacancy in the administration letters may be granted to some person, and that such substitution shall cause no delay in the administration of the estate (McClain's Ann. St. §§ 2348, 2349), and it was held that these provisions so changed and modified the common-law rule that an administrator *de bonis non* could sue on the bond of a former administrator to recover the proceeds of property belonging to the estate and converted by him: *Stewart v. Phenice*, 65 Iowa, 475 (22 N. W. 636). The objection that the petitioner has no authority to institute this proceeding is therefore, in our opinion, without merit.

It is next urged that the court was without jurisdiction, because the petition does not allege that Shaw's administrator had in his possession any property belonging to the Herren estate; but no relief is asked against him, except that he file in the county court such vouchers and papers belonging to the Herren estate as may be in his possession, and, besides, it is not clear upon what ground the sureties on Shaw's bond, who alone appeal, can urge this question.

2. Again, it is contended that the county court is without jurisdiction to compel the sureties of a deceased administrator to make final settlement of the accounts of their principal. It has been held by this court in *Adams v. Petrain*, 11 Or. 304 (3 Pac. 163), that no action or proceeding can be maintained upon the bond of an administrator or executor until final settlement of his accounts. Such settlement, therefore, is a prerequisite to an action by the petitioner to recover from the sureties the fund in Shaw's hands at the time of his death belonging to the Herren estate. Now, a settlement by the administrator *de bonis non* would manifestly not be binding on the sureties. As to them it would be *res inter alios acta*. Nor

can Shaw's administrator be compelled to make the final settlement: *Cross v. Baskett*, 17 Or. 84 (21 Pac. 47). The sureties of an executor or administrator, in the absence of fraud or collusion, are bound by the judgments or decrees against their principal in the course of administration (*Bellinger v. Thompson*, 26 Or. 320 (37 Pac. 714, 40 Pac. 229)); but they are not bound by acts done by the personal representatives or successors of their principal, for whose fidelity they have not promised to answer. No judicial ascertainment of the liability of an administrator after his death can be binding upon his sureties unless they are parties to the proceeding. In some jurisdictions it is held that the remedy in such cases is by a bill in equity against the sureties for an accounting: *Bush v. Lindsey*, 44 Cal. 121; *Chaquette v. Ortet*, 60 Cal. 594; *Curtiss v. Curtiss*, 65 Cal. 572 (4 Pac. 578); *Martin v. Ellerbe's Administrator*, 70 Ala. 326. These cases, however, are put upon the ground that the statutes did not confer authority upon the probate court to take and settle the accounts, and therefore relief must be had in a court possessing general equity powers. The constitution of this state provides that "the county court shall have the jurisdiction pertaining to probate courts": Const. Or. Art. VII, § 12. And the statute defining its jurisdiction declares: "The county court has the exclusive jurisdiction, in the first instance, pertaining to a court of probate; that is,—(1) To take proof of wills; (2) to grant and revoke letters testamentary of administration and of guardianship; (3) to direct and control the conduct and settle the accounts of executors, administrators, and guardians," etc.: Hill's Ann. Laws, § 895. The mode of proceeding in the county court, when sitting for the transaction of probate business, is in the nature of a suit in equity, and its jurisdiction of the parties is obtained by a citation (Hill's Ann. Laws, § 1078); and its orders or decrees for the payment of money may be enforced by execution in the same manner as similar orders or decrees in the circuit court (Hill's Ann. Laws, § 1082). These several statutory provisions not only confer upon the county court ample power and authority to settle and adjust the ac-

counts of a deceased administrator, but manifestly require that proceedings for that purpose shall be instituted in that court: *Davis v. Eastman*, 66 Vt. 651 (30 Atl. 1).

This is, in effect, the construction given to the statute in *Clark's Heirs v. Ellis*, 9 Or. 128, where it is held that a proceeding to contest the validity of a will and to revoke letters testamentary was properly commenced in the county court, and in *Adams v. Petrain*, 11 Or. 304 (3 Pac. 163), holding that no action can be maintained on an administrator's bond until after a final settlement of his accounts in the county court. In the latter case it is said: "In the case before us the account of the administrator was not settled in the county court. The circuit court undertook to discharge that duty, and the judgment which the respondent obtained in the action is based upon the settlement of accounts had in the circuit court. Was the settlement of this account a matter pertaining to the jurisdiction of a court of probate? It cannot be denied, and, besides, the statute quoted from expressly enumerates such settlements as within the jurisdiction belonging to a court of probate; and, if it is a subject of probate jurisdiction, which is undeniable, then it is within the exclusive jurisdiction of the county court, and the action of the circuit court was unwarranted." An adjudication against the administrator upon a citation to him will be binding upon his sureties, without notice to them. But if he die, leaving the estate unsettled, his sureties must be made parties to the proceeding, and citation issue to them, or the decree will not be binding upon them, or even evidence against them. We are agreed, therefore, that the demurrer to the petition was properly overruled. .

3. The remaining question is as to the amount which should be charged against Shaw on final settlement, and in that regard the findings of the court below must be affirmed. Shaw's semiannual account of April 26, 1894, which was approved by the county court, showed a balance in his hands at that time of \$2,481.49, and this account and the findings of the court furnish at least *prima facie* evidence against the sureties: *Bellinger v. Thompson*, 26 Or. 320 (21 Pac. 47); *Wilson v.*

Hinton, 63 Ark. 145 (38 S. W. 338); *Irwin v. Backus*, 25 Cal. 214 (85 Am. Dec. 125); *Pundmann v. Schoenich*, 144 Mo. 149 (45 S. W. 1112); *School Dist. v. Hubbard*, 110 Iowa, 58 (81 N. W. 241, 80 Am. St. Rep. 271). The burden of proof was therefore upon them to show that this fund has been properly administered. Upon the final settlement the court allowed for all disbursements shown by the testimony.

The decree of the court below is therefore affirmed.

AFFIRMED.

Argued 24 October; decided 18 November; modified 16 December, 1901.

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47	18

HAWKINS v. DONNERBERG.

[66 Pac. 691, 908.]

INSTALLMENT STOCK SUBSCRIPTIONS—WHEN PAYABLE.

1. Subscriptions for corporate stock are payable as the directors may call for them, or as the by-laws may provide, and the statute of limitations commences to run against the liability of the subscriber accordingly; thus, where the by-laws make the stock payable in monthly installments, the statute runs against each installment from the time it was payable, without any call or action by the corporation or the directors or officers.

PLEADING—LIMITATION OF ACTION—DEMURRABILITY OF COMPLAINT.

2. An allegation in a complaint in an action to recover unpaid subscriptions to capital stock of a corporation that there remained due on such subscriptions a stated amount, which was smaller than that for which defendant stockholders were originally liable, is an allegation that payments had been made, but not as to the time of such payments, so that the complaint was not demurrable on the ground that the right of recovery was barred by the statute of limitations; but under Hill's Ann. Laws, §§ 3, 67, requiring the objection that the action was not commenced within the time limited by statute to be taken by answer, unless such fact appears on the face of the complaint, that defense was available only by answer.

UNPAID SUBSCRIPTIONS—LIMITATION OF ACTION.

3. Creditors of a corporation cannot enforce the liability of stockholders for unpaid subscriptions to capital stock after the corporation's right to collect such subscriptions has become barred by the statute of limitations.

LIMITATION—EFFECT OF APPEARANCE—RUNNING OF STATUTE.

4. A voluntary appearance of a defendant is equivalent to the commencement of an action in its effect on the running of the statute of limitations.

From Multnomah: **JOHN B. CLELAND**, Judge.

Suit by D. R. Hawkins against August Donnerberg and numerous others to enforce an alleged liability for certain subscriptions to the stock of the Citizens' Real Estate Investment Co. Plaintiff had a decree and sundry defendants appealed.

REVERSED.

For appellant L. G. Clarke, there was a brief over the name of *Williams, Wood & Linthicum*, with an oral argument by *Mr. Geo. H. Williams*.

For appellants, Stubbs & Lawrence, there was a brief over the name of *Cake & Cake*, with an oral argument by *Mr. Harry M. Cake*.

For the other appellants there was a brief over the name of *Chamberlain, Thomas & Kraemer*, with an oral argument by *Mr. Warren E. Thomas*.

MR. JUSTICE MOORE delivered the opinion of the court.

This is a suit by a judgment creditor of an insolvent corporation to recover from certain of its stockholders the sum alleged to be due from each, respectively, on account of stock subscription. The facts are that the Citizens' Real Estate & Investment Company, having been duly incorporated under the laws of the State of Oregon with a capital stock of \$500,000, divided into five thousand shares of the par value of \$100 each, adopted by-laws containing the following provision: "The stock of this corporation shall be paid for in monthly installments of five per cent. upon the par value thereof;" that on September 19, 1891, L. L. Hawkins loaned said corporation the sum of \$6,000, for which it executed to him its promissory note, payable on demand, with interest at the rate of ten per cent. per annum; that on February 21, 1894, E. A. King loaned it \$3,500, and took its note for that sum, payable in ninety days, with like interest; that these notes were assigned to plaintiff, who, on November 10, 1898, secured a judgment against said corporation for the sum of \$11,875, upon

which was collected \$4,491.25 and \$1,986.87 on December 27, 1898, and July 21, 1899, respectively, and that said corporation is now insolvent. The complaint alleges that the defendants subscribed for stock of said corporation, and stipulated in their agreement to pay monthly therefor the sum of \$5 per share, until the par value thereof was fully paid; that they became the owners and holders of said stock on or before the date set opposite their respective names, upon which there is now due and unpaid, not including interest, as follows, to wit: "Donnerberg & Co., July 11, 1891, 6 shares, \$120.00." Then follow like statements in respect to the other defendants. A demurrer to the complaint on the ground that the suit had not been commenced within the time limited therefor having been overruled, each defendant averred in his answer "that more than six years have elapsed since the cause of suit alleged in the complaint accrued against these defendants, and the said suit is barred by the statute of limitations of the State of Oregon." A trial being had resulted in a decree for plaintiff, and defendants appeal.

1. It is contended by defendants' counsel that the right of a creditor of an insolvent corporation to subject its unpaid stock subscription to the satisfaction of his demands is limited to the rights of the corporation, and, as the subscriptions to the capital stock of the Citizens' Real Estate & Investment Company were payable in monthly installments, the statute of limitations had run against it, and hence the court erred in decreeing a recovery of any sum. The plaintiffs' counsel maintain, however, that a stockholder who has not paid his subscription occupies towards the creditors of a corporation the relation of guaranty, in which he undertakes, to the extent of his unpaid subscription, to pay the indebtedness of the corporation if it should become insolvent, and, this being so, his liability does not become absolute, so that the statute of limitations is set in motion, until the contingency occurs upon the happening of which his undertaking of indemnity is predicated; and if it be assumed, though denied, that the defense relied upon bars plaintiffs' right of suit, the expiration of the

period of the statute of limitations is manifest from an inspection of the complaint, and hence the immunity invoked is available only by demurrer, but the defendants, having answered over after their demurrer was overruled, thereby waived the privilege conferred by the statute. It will be remembered that the by-laws of the corporation provided that its stock should be paid for in monthly installments of five per cent. upon the par value thereof, and that the defendants stipulated in their subscription agreement to pay \$5 per month for each share of the stock negotiated for. The terms imposed by the by-laws and prescribed by the agreement required the defendants to pay the face value of the stock subscribed for in twenty months; so that, if the statute of limitations can be invoked in their favor at all, it began to run against the monthly installments as they severally matured.

2. The statute provides that a defendant may demur to the complaint within the time required by law to appear and answer, when it appears upon the face thereof that the action has not been commenced within the time limited thereby: Hill's Ann. Laws, § 67. But if not apparent from an inspection of the complaint that the remedy is barred, the objection can only be taken by answer: Hill's Ann. Laws, § 3; *Spaur v. McBee*, 19 Or. 76 (23 Pac. 818); *Davis v. Davis*, 20 Or. 78 (25 Pac. 140). It will be remembered that the complaint avers that the defendants became the owners and holders of the number of shares of said stock on or before the dates set opposite their respective names, upon which there was then due and unpaid, not including interest, as follows: "Donnerberg & Co., July 11, 1891, 6 shares, \$120," etc. Adding twenty months to the time when the defendants respectively subscribed for their shares of stock as the limit of time within which they agreed to pay therefor, and computing the time from such extended dates, more than six years had elapsed before this suit was instituted, and therefore the question to be considered is whether the complaint discloses that any payments were made by either of said defendants on account of their stock subscriptions within that period. It having been

alleged that Donnerberg & Co. subscribed for six shares of stock, upon which there was due and unpaid \$120, and the complaint having disclosed that this stock was of the par value of \$600, it is fairly inferable from the averments of the complaint that these parties had paid on account of their subscription the sum of \$480. It does not appear, however, when such payment was made, or upon what installments of the debt created by the subscription agreement it was applied. If paid, however, upon each of the installments, it would necessarily interrupt the running of the statute of limitations: *Bartel v. Mathias*, 19 Or. 482 (24 Pac. 918). But, the complaint having failed to disclose facts upon its face which might toll the plaintiff's remedy, the issue of the bar could not be tendered by a demurrer predicated upon the statutory ground that the suit had not been commenced within the time limited therefor, and hence the objection upon that basis could only be taken by answer.

As opposed to this view, plaintiffs' counsel call our attention to 13 Ency. Pl. & Pr. 206, where the editors of that valuable work say: "Averments of payments may avoid the bar of the statute and prevent the bill or petition from being demurrable, but such allegations must be certain;" citing in support of the text the case of *Murphy v. Phelps*, 12 Mont. 531 (31 Pac. 64), in which it was held that a complaint in an action on a note appearing on its face to be barred by limitation, which alleges the indorsement on the note of the receipt of a certain sum, without a direct averment that the maker had paid any sum thereon, is bad on demurrer. In that case the complaint purported to set out a copy of the note sued on, and alleged that the same was indorsed, "December 30, 1888, received \$90.30." It was also averred in another part of the complaint that "said note of \$558.26, less the indorsement thereon of \$90.30, is now due and unpaid." Mr. Justice HARWOOD, in deciding the case, says: "A statement in a complaint that an indorsement of the receipt of a certain sum appears on the promissory note sued on is not an averment that the obligor has paid any sum thereof. The indorsement could be placed

thereon without payment, and the statement in the complaint that the note is indorsed, 'December 30, 1888, received \$90.30,' could be made in truth, although the maker of the note had paid nothing whatever thereon. Neither is the allegation of the sixth paragraph of the complaint that 'said note, less the indorsement thereon of \$90.30, is now due and unpaid,' an averment that said sum was paid on said note, it might be truly alleged that the amount of the note was due, less the amount of said indorsement, when in fact the whole amount of the note was due and unpaid, including the sum stated as indorsed thereon. When the vital question is whether the claim is or is not barred by the statute of limitations, and the determination of such question depends upon the fact of the payment, such uncertain allegations as to that fact are insufficient. Therefore, if defendant had rested on his demurrer, we should be constrained to hold the complaint defective in thus failing to state facts sufficient to constitute a cause of action."

In the case at bar the allegation in the complaint that each defendant, on or before the date stated, subscribed for and became the owner and holder of a certain number of shares of said capital stock, upon which there is due and unpaid a stated sum, which is less than the par value of the stock, is equivalent to an averment of payment of the difference, the only uncertainty being in respect to the time when such payment was made. The complaint does not disclose the time, and, since a payment removes the bar of the statute by fixing a new period from which it begins to run, the certainty of that date as a basis of computation ought to be apparent on the face of the complaint to render it vulnerable to a demurrer on the ground that the suit has not been commenced within the time prescribed therefor. In the case relied upon the date of the indorsement is certain, but whether any payment was made is quite problematical. It will be observed from the language quoted that the court does not intimate that the bar of the statute could be interposed by a demurrer, but that, if the defendant had relied upon the demurrer, the court would have been constrained to hold that the complaint did not state facts

sufficient to constitute a cause of action. The rule there announced is not applicable in this state, in which it is settled that, if the bar of the statute is not apparent from an inspection of the complaint, the objection that the action has not been commenced within the time prescribed by law can only be taken by answer, and, if not so raised, it is waived; which is not the case where the complaint does not state facts sufficient to constitute a cause of action: Hill's Ann. Laws, § 71; *Wyatt v. Henderson*, 31 Or. 48 (48 Pac. 790); *Willits v. Walter*, 32 Or. 411 (52 Pac. 24); *Kimball v. Redfield*, 33 Or. 292 (54 Pac. 216). Therefore, to render a complaint demurrable on the ground that the suit or action has not been commenced within the time prescribed, the allegation of payment necessary to remove the bar must be direct and certain, and not deducible from inference or presumption; and hence the objection that the suit had not been so commenced could only be taken, as it was, by answer.

3. This brings us to a consideration of the question whether the defendants can invoke the statute of limitations to defeat the creditor's remedy in his attempt to collect their unpaid stock subscriptions. Such subscriptions constitute a part of the assets of a corporation, and help to form the basis of its credit, and, when collected, the fund so raised is to be used in the transaction of its legitimate business and in the payment of its debts: *Ladd v. Cartwright*, 7 Or. 329; *Brundage v. Monumental, etc. Min. Co.* 12 Or. 322 (7 Pac. 314). The stockholder who enters into a contract with the corporation whereby he secures certain shares of its capital stock in pursuance of his agreement to pay therefor either within a definitely fixed time or upon the happening of a contingency, creates no privity of contract between himself and a creditor of the corporation, and he is not liable to the latter, except indirectly, through the corporation, and then only to the extent of his unpaid subscription: Const. Art. XI, § 3; *Hodges v. Silver Hill Min. Co.* 9 Or. 200; *Aldrich v. Anchor Coal Co.* 24 Or. 32 (32 Pac. 756, 41 Am. St. Rep. 831). Subscriptions for the purchase upon credit of shares of stock of a corporation, in

which no time of payment is specifically stated, is tantamount to an agreement to pay therefor in such installments and at such times as may be required by the directors of the corporation: *Hightower v. Thornton*, 8 Ga. 486 (52 Am. Dec. 412). In such case the liability of the stockholder is conditional, and does not become absolute until an assessment is made by the directors, in pursuance of which he is called upon to pay the whole or a part of his subscription: *Glenn v. Priest*, (C. C.) 48 Fed. 19; *Macon, etc. Ry. Co. v. Vason*, 52 Ga. 326; *Cherry v. Lamar*, 58 Ga. 541; *Glenn v. Williams*, 60 Md. 93; *Hawkins v. Glenn*, 131 U. S. 319 (9 Sup. Ct. 739); *Glenn v. Liggett*, 135 U. S. 533 (10 Sup. Ct. 867). If the directors of a corporation neglect to make such call, a creditor, upon the insolvency of the corporation, may proceed in equity to collect from the subscribers the sums due upon their subscription: *Glenn v. Semple*, 80 Ala. 159 (60 Am. Rep. 92). In *Ogilvie v. Knov Ins. Co.* 63 U. S. (22 How.) 380, Mr. Justice GRIER, in speaking of the relation of the defaulting subscribers of an insolvent corporation, and of the character and effect of a suit in equity by the creditors to collect their subscription, says: "As stockholders who have not paid in the whole amount of the stock subscribed and owned by them, they stand in the relation of debtors to the corporation for the several amounts due by each of them. As to them, this bill is in the nature of an attachment, in which they are called on to answer as garnishees of the principal debtor." "A creditor's bill," says Mr. Justice STRONG in *Hatch v. Dana*, 101 U. S. 205, "merely subrogates the creditor to the place of the debtor, and garnishes the debt due to the indebted corporation."

In *Powell v. Oregonian Ry. Co.* (C. C.) 38 Fed. 187 (3 L. R. A. 201), DEADY, J., speaking upon this subject, says: "In effect, the plaintiff is thereby subrogated to the right of the corporation to demand and have of and from the defendant, as the holder of its unpaid stock, the balance due thereon, or sufficient thereof to satisfy his demand." If a creditor of an insolvent corporation, by instituting a suit against its stockholders to subject their unpaid subscriptions to the

satisfaction of his demand, is thereby subrogated to the rights of the corporation in respect to its stockholders, it follows that the creditor can secure no greater right by pursuing such a method than his debtor possessed; and hence, if the statute of limitations precludes the corporation from recovering the unpaid subscription from its subscriber, the creditor's remedy against him is also barred, unless some trust attaches to the debt in the hands of a stockholder, which precludes him from interposing such a defense. In *Wood v. Dummer*, 3 Mason, 308 (Fed. Cas. No. 17,944), the capital stock of an incorporated bank having been divided among its stockholders, thereby depriving it of assets necessary to meet the payment of its outstanding notes, it was held that such stock constituted a trust fund for the payment of the bank's obligation, which might be followed into the hands of its stockholders. The conclusion reached by Mr. Justice STORY in that case, instead of being put upon the theory of a trust attaching to the assets of a corporation for the benefit of its creditors, might have been safely predicated upon the principle that a debtor must be just before he is generous; that is, that he must pay his debts before he can be permitted to make a voluntary distribution of his property. And this rule applies as well to an individual as to a corporation: *Childs v. N. B. Carlstein Co.* (C. C.) 76 Fed. 86. In *Fogg v. Blair*, 133 U. S. 534 (10 Sup. Ct. 338), Mr. Justice FIELD, in commenting upon the theory that a corporation holds its property in trust for the payment of its debts, says: "That doctrine only means that the property must first be appropriated to the payment of the debts of the company before any portion of it can be distributed to the stockholders. It does not mean that the property is so affected by the indebtedness of the company that it cannot be sold, transferred, or mortgaged to *bona fide* purchasers for a valuable consideration, except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no existence." When a debtor has unlawfully disposed of his property to the injury of his creditors, the rule is quite uniform that if it, or the fund arising therefrom, can be identified, a

court of equity will subject it to the satisfaction of their just demands. But the right of creditors in such cases is predicated upon the fraud which superinduced the sequestration, and not upon a trust. The doctrine announced in *Wood v. Dummer*, 3 Mason, 308 (Fed. Cas. No. 17,944), has been applied in suits in equity by creditors of insolvent corporations to recover from stockholders their unpaid stock subscriptions, and it has been held that the sums due from them constituted a trust fund, which should be restored: *Baker v. Atlas Bank*, 9 Metc. (Mass.) 182; *Payne v. Bullard*, 23 Miss. 88 (55 Am. Dec. 74); *McGinnis v. Barnes*, 23 Mo. App. 413; *Mumma v. Potomac Co.* 33 U. S. (8 Pet.) 281; *Sawyer v. Hoag*, 84 U. S. (17 Wall.), 610.

In the cases to which attention has been called, and in many others that might be cited to the same effect, no fraud appeared, and the right of a court of equity to recover the subscriptions might have been put upon the principle of marshaling assets; for, no definite time having been prescribed for the payment of the stock subscription due the insolvent corporation, the stock was payable in such installments and at such times as required by the directors, which rendered the subscriptions equivalent to an agreement on the part of the stockholders to pay on demand; and hence the statute of limitations did not begin to run in favor of the stockholders until a call was made upon them to pay the assessment. The corporation's cause of action, therefore, did not accrue until such demand was made, and the creditor, by bringing his suit against the stockholder to recover his unpaid subscription, in effect garnished the sum due from the latter to the corporation, and applied it, when collected, to the satisfaction of his demand. In *South Carolina Mfg. Co. v. Bank of State*, 6 Rich. Eq. 227, the trust fund theory, as applied to a case similar to that under consideration, is criticised, Chancellor DUNKIN saying: "It appears to the court a misapprehension to suppose that, as between the creditors of a corporation and a defaulting subscriber, any trust exists. The fiduciary relation may be between the creditors and the corporation, but the contract of the

subscriber to the stock is direct and single. No privity exists between him, as an individual, and any creditor of the corporation. He can only be reached by the creditor through the corporation; and this is the only equity of the creditor, to wit, to be subrogated, *pro hac vice* to the rights of the corporation. If the rights of the corporation are lost, or their remedy barred, the creditor has no equity to revive them. The statute of limitations is not an act of amnesty. It probably proceeds on the presumption that the debt has been paid, but that, from lapse of time, the evidence of payment has been lost or destroyed." In *Hospes v. Northwestern Car Co.* 48 Minn. 174 (50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637), a suit having been instituted by a creditor of an insolvent corporation to recover from its stockholders the amount of their unpaid stock, it was held that a corporation does not hold its property in trust for its creditors, except in the sense that there can be no distribution of it among stockholders without provision being first made for the payment of the corporate debts. Mr. Justice MITCHELL, speaking for the court, in rendering the decision, says: "Corporate property is not held in trust, in any proper sense of the term. A trust implies two estates or interests,—one equitable and one legal; one person, as trustee, holding the legal title, while another, as *cestui que trust*, has the beneficial interest. Absolute control and power of disposition are inconsistent with the idea of a trust. The capital of a corporation is its property. It has the whole beneficial interest in it, as well as the legal title. It may use the income and profits of it, and sell and dispose of it, the same as a natural person. It is a trustee for its creditors in the same sense and to the same extent as a natural person, but no further." To the same effect, see *Worthen v. Griffith*, 59 Ark. 562 (28 S. W. 286, 43 Am. St. Rep. 50;); *Childs v. N. B. Carlstein Co.* 76 Fed. 86; *O'Bear Jewelry Co. v. Volfer*, 106 Ala. 205 (28 L. R. A. 707, 17 South. 525, 54 Am. St. Rep. 31); *Bank of Montreal v. Potts Salt & L. Co.* 90 Mich. 345 (51 N. W. 512); *Corey v. Wadsworth*, 118 Ala. 488 (25 South. 503); *Graham v. La Crosse & M. R. Co.* 102 U. S. 148; *Hollins v.*

Brierfield C. & Iron Co. 150 U. S. 371 (14 Sup. Ct. 127). The decisions here adverted to are to the effect that no trust attaches in the hands of a stockholder to the unpaid stock subscription of an insolvent corporation, from which it follows that a creditor who, in equity, seeks to subject such credits of his debtor to the satisfaction of his demand, takes no greater interest therein than his debtor possessed; and, this being so, the statute of limitations necessarily began to run in favor of the defendants when the corporation's cause of action matured against them.

The by-laws and the subscription agreement specified that the capital stock should be paid for at the rate of \$5 per month per share, or in twenty months. The subscribers having thus agreed to pay for this stock at a definite time, no assessment or call was required on the part of the corporation: *Hawkins v. Citizens' Invest. Co.* 38 Or. 544 (14 Am. & Eng. Corp. Cas. N. S. 81, 64 Pac. 320). In *Baltimore Turnpike Co. v. Barnes*, 6 Har. & J. 57, which was an action by a corporation against the stockholders to recover an unpaid subscription, which, by the terms of the charter, matured in installments, it was held that the statute of limitations began to run against them as they severally matured. The court said: "The plaintiffs had a right to demand from the defendant the amount of each installment when it became due, and limitation attached at that time. They were, then, barred by the pleas of the defendant as to the first installments, because more than three years had elapsed from the time they were demandable to the institution of the suit." In *Brown v. Union Ins. Co.* 3 La. Ann. 177, it was held that a creditor of an insolvent corporation could not recover from a stockholder when it appeared that more than ten years had elapsed since the maturity of the last installment due on the stock before the institution of the proceeding. In *Stark v. Burke*, 9 La. Ann. 341, the court, in discussing a similar question, said: "We entertain no doubt that the plea would be tenable if the original relations between the corporation and its stockholders had subsisted. As soon as the debt matured, it was an obligation which the corporation had a

right to enforce by a suit, and the prescription of ten years began to run against the corporation, the creditor of the debt due." In *Phillips v. Therasson*, 11 Hun, 141, a statute having provided that all stockholders were liable to an assessment call to the amount of stock held by them respectively for all debts of the corporation until the capital stock was paid up in full, and declared a corporation dissolved if such stock was not paid in two years from its incorporation, it was held that an action to enforce the liability thereby created must be brought before the expiration of six years from the termination of the two years allowed for paying the capital stock, or it would be barred by the statute of limitations. If the several defendants had executed to the Citizens' Real Estate & Investment Company twenty promissory notes, each for one twentieth of the face value of the stock subscribed for, and consecutively payable in from one to twenty months, respectively, the statute of limitations would undoubtedly begin to run against the corporation upon the maturity of each of said notes; and, this being so, it cannot be supposed that the statute would not also be set in motion upon the maturity of the several installments, the terms and time of payment of which were prescribed by the by-laws and the subscription agreement, because they were evidenced in a less formal manner.

An examination of the transcript shows that more than six years had run against the corporation and in favor of the defendants, and hence the decree will be reversed, and one entered here in accordance with this opinion. REVERSED.

Decided 16 December, 1901.

ON MOTION TO AMEND THE DECREE.

MR. JUSTICE MOORE delivered the opinion.

4. This is a motion for the modification of a decree of this court. The transcript shows that the complaint was filed September 21, 1899, but does not show that any summons was ever issued, served, or attempted to be served. It does appear, however, that the defendants Stubbs & Lawrence, E. G. Clark,

and H. T. Hudson demurred to the complaint before six years from the maturity of the last installment of \$5 due from each, respectively, had elapsed, though the decree was not rendered until after the expiration of that period. A defendant appears in an action or suit when he answers, demurs, or gives the plaintiff written notice of his appearance (Hill's Ann. Laws, § 530), and a voluntary appearance of the defendant shall be equivalent to personal service of the summons upon him: Hill's Ann. Laws, § 62. An action shall be deemed commenced as to each defendant when the complaint is filed and the summons served on him, or on a codefendant who is a joint contractor or otherwise united in interest with him: Hill's Ann. Laws, § 14. An attempt to commence an action shall be deemed equivalent to the commencement thereof, within the meaning of this title, when the complaint is filed and the summons delivered, with the intent that it shall be actually served, to the sheriff or other officer of the county in which the defendants, or one of them, usually or last resided. But such attempt shall be followed by the first publication of the summons or the service thereof within sixty days: Hill's Ann. Laws, § 15. Actions at law shall be commenced by filing a complaint with the clerk of the court, and the provisions of sections 14 and 15 shall only apply to this subject for the purpose of determining whether an action has been commenced within the time limited by this code: Hill's Ann. Laws, § 51. Construing these sections in *pari materia*, we think the suit was commenced, within the meaning of the statute, when said defendants made their voluntary appearance: *Sharp v. Maguire*, 19 Cal. 577; *Hancock v. Ritchie*, 11 Ind. 48. There was due, on October 4, 1893, from E. G. Clark and H. T. Hudson, respectively, the sum of \$5, and on the next day, from Stubbs & Lawrence, the same sum, which constituted the last installment due from each on account of their respective subscriptions to the capital stock of the Citizens' Real Estate & Investment Company. The statute of limitations not having run against these installments at the time the defendants voluntarily appeared in this suit, plaintiff is entitled to recover

said sums from each, respectively, with interest from the maturity thereof, and the decree will be modified accordingly. As these several sums could probably have been collected from said defendants upon demand, without a suit therefor, they are awarded their costs and disbursements in this court, and in the court below.

DECREE MODIFIED.

Decided 25 November, 1901.

FISHER v. TOMLINSON.

[66 Pac. 390, 66 Pac. 696.]

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40	618

EFFECT OF ABANDONING AN ATTEMPTED APPEAL.

1. A party may abandon an imperfectly attempted appeal and initiate another one, the unsuccessful attempt not being conclusive of his right: *Holladay v. Elliott*, 7 Or. 483, followed; *Schmeer v. Schmeer*, 16 Or. 243, and *Nestucca Wagon Road Co. v. Landingham*, 24 Or. 439, applied.

MECHANICS' LIEN—AGENCY OF RETAIL DEALER.

2. A retail dealer who sells to a contractor building material that is used in a building is not an agent, contractor, subcontractor, architect, builder, or other person having charge of the construction of a building, within the meaning of Hill's Ann. Laws, § 3669, giving a mechanics' lien for materials furnished to such person; and a manufacturer or wholesaler who furnished such material to the retailer cannot enforce a lien therefor.

From Marion: REUBEN P. BOISE, Judge.

Suit by Fisher, Thorsen & Co. against S. Tomlinson and others to enforce an alleged mechanics' lien for materials sold to one Roberts, a retail dealer, who sold some of them to the contractor Tomlinson. There was a decree for defendants and plaintiffs appeal. There was a motion to dismiss the appeal which was overruled, and the case affirmed on the merits. The facts appear in the opinions which were written by Judge WOLVERTON, and Judge MOORE, respectively.

MOTION OVERRULED; AFFIRMED.

Decided 13 March, 1900.

ON MOTION TO DISMISS APPEAL.

Messrs. W. T. Slater and Wm. M. Kaiser, for the motion.

Mr. Chas. J. Schnabel, contra.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

The respondents, except the Northwest Door Company, moved to dismiss the appeal herein, and they assign as a reason therefor that the transcript was not filed with the clerk of this court within thirty days from the date on which the appeal was perfected. A notice of appeal, directed to John Manning, E. P. Morcum, W. T. Slater, and W. M. Kaiser, attorneys for all the defendants, showing due acceptance of service thereof by John Manning, "one of attorneys for said defendants and respondents," on October 6, 1899, was, together with an undertaking on appeal, filed with the clerk of the court below October 7, 1899. Subsequently another notice was served, all of the defendants except the Northwest Door Company accepting service thereof November 7, 1899, by John Manning, their attorney, and the Northwest Door Company, by H. A. Cornell, its president. This notice, together with a new undertaking, was filed with the clerk November 9, 1899. No transcript was filed in this court until more than thirty days after the time for excepting to the sureties on the first undertaking. It is claimed that John Manning was never the attorney of record for the Northwest Door Company, and was without authority to accept service of the notice of appeal for said company, and, as a matter of fact, such acceptance was made through inadvertence, and it was for this reason the second notice was served. The question is presented, therefore, whether the appeal was perfected by the service and filing of the first notice and undertaking. If so, this appeal should be dismissed; otherwise, not: *Nestucca Wagon Road Co. v. Landingham*, 24 Or. 439 (33 Pac. 983). If the Northwest Door Company was a necessary party to the appeal (and

we must conclude that it was, being made a party defendant in the original suit, and no showing or contention having been made by the other respondents to the contrary), then the appeal was not perfected, for the very good reason that the other respondents would have had a right to its dismissal because the notice was not served upon the company, being an adverse party. Mr. Chief Justice KELLY said in *Holladay v. Elliott*, 7 Or. 483: "We hold that a party appellant may abandon an attempted appeal when he discovers that he has given an imperfect notice, or when it is inconvenient or impossible for the surety to justify in case of exception to his sufficiency." To the same effect, see, also, *Schmeer v. Schmeer*, 16 Or. 243 (17 Pac. 864). It is clear that plaintiffs filed an imperfect notice in the first instance. They had a right, therefore, to abandon the attempted appeal, serve another notice, and perfect their appeal through the latter instead of the former. The transcript having been filed within thirty days of the completion of the appeal upon the latter notice, the motion to dismiss will be denied.

MOTION OVERRULED.

Decided 25 November, 1901.

ON THE MERITS.

For appellants there was a brief over the names of *Chas. J. Schnabel* and *Henry St. Rayner*, with an oral argument by *Mr. St. Rayner*.

For respondents there was a brief and an oral argument by *Messrs. John Manning, E. P. Morcom, Wm. M. Kaiser, and Woodson T. Slater*.

MR. JUSTICE MOORE delivered the opinion of the court.

This is a suit to foreclose an alleged mechanics' lien. It is stated in the complaint, in effect, that about December 17, 1898, the plaintiffs entered into a contract with the defendants S. Tomlinson, Charles P. Strain, and Nettie V. Strain, by and

through one W. T. Roberts, who for that purpose was acting as the agent and contractor of said defendants, whereby plaintiffs furnished them with certain window glass, putty, and paint, of the value of \$198.21, to be used and which were used, in the construction of a two-story brick building situated upon lot 4 in block 1 in Woodburn, Oregon, which building they then owned; that they paid on account of said bill the sum of \$18.33, and, to secure the remainder, plaintiffs, prior to the completion of said building, filed in the office of the county clerk of Marion County their claim of lien against said lot and building; that the Northwest Door Company, a corporation, has a mechanics' lien on said premises to secure the payment of the sum of \$90.81; that Woodburn Lodge, No. 102, I. O. O. F., S. F. Hobard, Lila Dolan, Lola Dolan, Martin Dolan, Alfred Dolan, and B. D. Flint have or claim some interest in said premises, but, if any such they have, it is inferior to plaintiffs' lien. The answer denies the material allegations of the complaint, and avers that the defendant Tomlinson had full charge and control of the construction of the lower story of said building, and employed all the labor bestowed thereon, and furnished all the material used therein; that said Roberts was at the time stated in the complaint a retail dealer at Woodburn in paints, oils, doors, etc., from whom Tomlinson purchased goods, wares, and merchandise of the kind set forth in the complaint, and of the value of \$307.04. which he used in the construction of the lower story of said building, and for which he fully paid Roberts at the time said goods were purchased, and prior to the filing of plaintiffs' claim of lien; that Roberts was not a contractor of said defendants, or any of them; that he never had charge or control of the work or construction of said building, or any part thereof, and was not at any time the agent of said defendants, or either of them, for the purpose of purchasing goods, wares, or merchandise, or material for said building, or for any part thereof. The reply having put in issue the allegations of new matter in the answer, a trial was had, resulting in a decree dismissing the suit, and plaintiffs appeal.

2. The question presented for consideration is whether Roberts sustained such relations to the defendants as would bind them by his contract for material used in the construction of the building. The statute conferring the right to a lien, so far as it is deemed applicable to the facts involved, is as follows: "Every * * * person * * * furnishing material of any kind to be used in the construction * * * of any building * * * shall have a lien upon the same for the * * * material furnished at the instance of the owner of the building * * * or his agent; and every contractor, subcontractor, architect, builder, or other person having charge of the construction * * * of any building * * * shall be held to be the agent of the owner for the purposes of this act": Hill's Ann. Laws, § 3669. The testimony shows that the defendant Tomlinson is the owner of an undivided two thirds, and the defendants Charles P. and Nettie V. Strain are the owners of the remaining interest, in the first story of the brick building erected upon said lot, except a stairway leading to the second floor, which is owned, together with the upper story of said building, by the defendant Woodburn Lodge, No. 102, I. O. O. F. Tomlinson is a carpenter, and as such had the exclusive charge of and controlled the mechanics and laborers whom he employed to aid him in constructing the lower story, and he also purchased all the material used therein, for which he fully paid. Prior to and at the time said building was being constructed, Roberts was a retail dealer at Woodburn, keeping for sale a stock of paints, oils, sash, doors, molding, and other building material; and, having solicited Tomlinson's patronage, a contract was entered into between them whereby, in consideration of the sum of \$300, he agreed to furnish the necessary material to finish the front of the first story of said building; but, never having kept for sale any plate glass, and not having in stock sufficient sheet glass to fill his contract, he ordered from plaintiffs the material in question, writing to them that, bids for the completion of the store front having been opened, his was found to be the lowest, and that the contract had been awarded to him to furnish the shop work

and glass. But Roberts being indebted to them for goods previously delivered, in the sum of \$81.67, they declined to supply the material ordered until he paid such indebtedness, whereupon he secured from Tomlinson the sum of \$100, which he sent to the plaintiffs, who, in the absence of any instructions as to its application, appropriated the same in discharging said prior debt; and, having shipped the material ordered, they credited the sum of \$18.33 on account thereof. Roberts' time not being fully occupied in waiting on his customers, he was employed by Tomlinson, under whose direction he worked on said building during his spare hours, performing ten days' labor in glazing windows and in carpenter work, for which he received compensation based upon ten hours' work being equivalent to a day's labor.

The testimony fails to disclose that Roberts was an agent of or had authority from the defendants, or either of them, to order on their account the material supplied by the plaintiffs; and it conclusively appears that Roberts did not have charge of the construction of any part of said building, and that he was not a contractor, subcontractor, architect, or builder in respect to the owners of the building, or of any person in privity with them. His letters to plaintiffs to the effect that he had secured the contract to furnish all the shop work, sash, doors, glass, etc., do not intimate that he was to place in the building, as a part thereof, any of the material ordered. He was, therefore, as the evidence clearly shows, only a material man, and it is unimportant whether he manufactured the material, or secured it from others who did so, or who kept it in stock for sale. A rule recognizing a manufacturer as the only person entitled to be denominated a "material man" would necessarily defeat the lien of middlemen for material used in the construction of a building, notwithstanding such material may have been purchased from the manufacturer and paid for by the dealer. So, too, if a manufacturer could assert a lien because he had not been paid for material sold and delivered to a retail dealer, which the latter, upon being paid therefor, sold to the owner of a building, who attached it to his estate,

then the owner, when he buys any material to be used in the construction of a building, that the retail dealer does not manufacture, must become a surety for the latter,—a conclusion which would necessarily destroy all retail trade in building material. Roberts was a retail dealer in such material, and, having no charge of the construction of the building, he was not the statutory agent of the owners, and no lien in plaintiffs' favor for any material so ordered by him ever attached to their premises.

It follows that the decree is affirmed.

AFFIRMED.

Argued 4 November; decided 25 November, 1901.

HOUCK v. ASHLAND.

[66 Pac. 697.]

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46	340

CONSTRUCTION OF CITY CHARTER—INTOXICATING LIQUORS.

1. The charter of the City of Ashland, Laws, 1901, p. 287, considered in its entirety, confers on the city council power to regulate the sale of intoxicating liquors, and to require a license therefor, and not merely a power to license and regulate barrooms and drinking houses and places where liquor was sold.

CONSTRUCTION OF PARTLY VOID ORDINANCE.

2. An ordinance partly void for lack of power to enact it will be valid so far as it is within the authority conferred on the council, and void so far as it is beyond that authority, where the parts are severable.

ORDINANCE—PROHIBITING SALES OF INTOXICATING LIQUORS.

3. Ashland City Charter (Sess. Laws, 1901, p. 287,) provided that the city council should annually vote on the question as to whether a license should be issued for the sale of intoxicating liquors for the ensuing year, and that, if the majority voted in the negative, no license should be issued during that time. After the time when the first vote had presumably been taken, an ordinance was passed making it a misdemeanor for any person to sell liquor without a license. *Held*, that by its failure to provide a means by which licenses could be obtained, and by the ordinance passed, making it an offense to sell without a license, the city had effectually prohibited the sale of liquor, and no prohibitory ordinance was necessary to prosecute for sales.

From Jackson: HIERO K. HANA, Judge.

Jesse Houck and Joseph Dame were convicted of violating an ordinance against selling intoxicating liquors without a license, and appeal.

AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. C. B. Watson*.

For respondent there was a brief over the names of *W. C. Hale, Jas. R. Neil, and H. L. McWilliams*, with an oral argument by *Messrs. Hale and McWilliams*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

The appellants were convicted in the Recorder's Court of the City of Ashland of violating "an ordinance declaring the illegality of keeping or maintaining a barroom, drinking shop, drinking saloon, tippling-house, clubhouse, or clubroom, or other place in which spirituous, vinous, malt, or intoxicating liquors are kept, sold, disposed of, or given away, and the selling, disposing of, furnishing, or giving away spirituous, vinous, malt, or intoxicating liquors, without first having procured a license therefor from the city council of the City of Ashland, Oregon," approved March 12, 1901, by unlawfully selling and delivering to "one K. J. Johnson one pint of intoxicating liquor, to wit, whisky, without first having obtained a license so to do." The ordinance referred to provides:

"Sec. 1. It shall be unlawful for any person or persons to keep or maintain within the limits of the City of Ashland, Oregon, any barroom, drinking shop, drinking saloon, tippling-house, clubroom, clubhouse, or any other place in which spirituous, vinous, malt, or intoxicating liquors are kept, sold, disposed of, or given away, without first duly procuring a license therefor from the city council of the said City of Ashland.

"Sec. 2. It shall be unlawful for any person to sell or dispose of any spirituous, vinous, malt, or intoxicating liquors within the City of Ashland, Oregon, without having first duly procured from the city council of the City of Ashland, Oregon, a license therefor."

By its charter, in addition to the general power to enact by-laws and ordinances not in conflict or inconsistent with the laws of the state or of the United States, and to provide for the punishment of violators thereof, the city is given the "full and

exclusive right, within the corporate limits, to provide prerequisites to licensing, and to license, regulate and control * * * drinking saloons, barrooms, clubrooms, or any other place within the city where spirituous, vinous, malt, or intoxicating liquors of any kind are kept, sold, disposed of, or given away, in any quantity whatever, except upon the prescription of a duly licensed physician, and for medicinal purposes exclusively. * * * No license for the sale or disposal of spirituous, vinous, malt, or intoxicating liquors as a beverage within the corporate limits, shall be granted for a longer period than the municipal year, nor for a less sum than \$800 nor more than \$1,000, as the city council may determine, for such municipal year. No person shall be licensed to sell or dispose of spirituous, vinous, malt, or intoxicating liquors, by the city council, unless he shall first give bond, in the penal sum of not less than \$2,000, nor more than \$5,000, payable to the City of Ashland, Oregon, with at least two good and sufficient sureties. * * * It shall be the duty of the city council, at the first regular meeting of such city council to be held after the passage of this act, and annually thereafter, between the first and fifteenth days of January of each year, to take a vote on the following question: 'Shall the city council of Ashland, Oregon, license the sale of spirituous, vinous, malt, or intoxicating liquors within the corporate limits of the City of Ashland, Oregon, for the ensuing year.' If a majority of such city council, or one half of the whole number of such city council, together with the mayor, vote against the issuance of such liquor license, then no such license can be issued by such city council for such municipal year. * * * If a majority of such city council, or one half of the whole number of such city council, together with the mayor, vote in favor of the issuance of such liquor license, then the mayor and city council shall issue such license to any reputable male citizen, over twenty-one years of age, applying therefor, and who may have conformed, and agrees to conform, to all of the requirements of this charter and all of the laws and ordinances of the said City of Ashland': Laws, 1901, p. 287. Upon a writ of re-

view sued out of the circuit court by the appellants, the judgment of the recorder's court was affirmed, and hence this appeal.

1. It is urged that section 2 of the ordinance under which the appellants were convicted is void, because the city has no power or authority to license or regulate the sale of intoxicating liquors, or to make it an offense to sell such liquors without a license. This argument is based on the clause in the charter conferring the power to license, regulate, and control drinking saloons, barrooms, etc., ignoring the other provisions thereof. The contention is that the power to license, regulate, and control places where intoxicating liquors are sold does not authorize the city to license or regulate the sale of such liquors. Under such a power a municipality may make it unlawful for any person to sell or deliver to another intoxicating liquors, to be drunk on the premises of the vendor, without first obtaining a license therefor: *In re Schneider*, 11 Or. 288 (8 Pac. 289); *Portland v. Schmidt*, 13 Or. 17 (6 Pac. 221). And in view of the rule hereinafter referred to, that an ordinance of this kind may be enforced so far as authorized by the charter, although its language may be broad enough to cover sales which the city has no power or authority to control, it is probable that the court would, if necessary to sustain the judgment, construe the section under which the appellants were convicted to refer to sales made by the owner or keeper of a barroom, drinking house, etc. But we do not deem it necessary to consider this question, or to decide whether the mere power to license, regulate, and control places where intoxicating liquors are sold confers by implication, as a means of such regulation, the power to prohibit the sale without a license. In our opinion, the several provisions of the charter, when taken together, show a clear and manifest intent on the part of the legislature to fully authorize and empower the city to license, regulate, and control the sale of intoxicating liquors. The law is elementary that municipal authorities can exercise only such powers as are granted in express words, or necessarily or fairly implied in, or as an incident to, the powers expressly granted:

1 Dillon, Mun. Corp. (4 ed.) § 89. But the extent of their power is one of construction; the intention being in all cases to determine the legislative intent, in order to give it fair effect. We must look, then, to the entire charter, to ascertain whether it authorizes the ordinance in question. It will be observed that it provides that no license "for the sale or disposal" of intoxicating liquors shall be issued, except upon certain prescribed conditions, and that the city council shall annually determine by vote whether the city shall license "the sale of liquors." Considering these provisions in connection with the general welfare clause and the remainder of the charter, it is clear the legislature intended to, and did, confer upon the city, either directly or by fair implication, the general power and authority to license and regulate not only barrooms and drinking houses, but also the sale of intoxicating liquors. And in this conclusion we are supported by the case of *Woods v. Town of Prineville*, 19 Or. 108 (23 Pac. 880), where the city charter empowered the city to license, tax, regulate, restrain, or suppress places where spirituous or malt liquors were sold, provided that the state law regulating the tavern or grocery license should not apply to persons selling liquor within the corporate limits of the town; and the court said: "The plain intent of this section was to confer upon the council authority to license, tax, regulate, restrain, or suppress barrooms, tippling-houses, etc., and the exclusive authority to license the sale of liquors, within the corporate limits of said town."

2. It is next contended that the ordinance is void because it is not limited to the sale of liquors as a beverage, and does not exempt from its provisions sales made upon the prescription of a licensed physician. But the objection that a city ordinance is broader than the charter, and embraces matters not within the power of the city, cannot, as a general rule, be urged by persons who come within the power delegated; and so it is held that, even if a city ordinance prohibiting sales of intoxicating liquors embraces a class of sales which the city has no power to interfere with, it may still be enforced as to such sales as the city has power to prohibit: Black, Intox. Liq. 221; *Har-*

baugh v. City of Monmouth, 74 Ill. 367; *Ex parte Cowert*, 92 Ala. 94 (9 South. 225); *State v. Priester*, 43 Minn. 373 (45 N. W. 712); *Burnside v. Lincoln County Ct.* 86 Ky. 423 (6 S. W. 276). If, therefore, the city has no power to license, regulate, or control the sale of intoxicating liquors upon the prescription of a duly licensed physician, and for medicinal purposes exclusively, it does not avoid the ordinance under which plaintiffs were convicted, or constitute a defense for them.

3. Again, it is insisted that no provision has been made by the city by which a license for the sale of liquors can be obtained, and therefore a conviction for the sale without a license is void. In obedience to the writ of review, the city recorder sent up a copy of the ordinance under which appellants were convicted, with his certificate "that there is no other ordinance now in force relating to the sale or disposal of intoxicating liquors." The present objection is based upon the facts stated in this certificate. Waiving all questions of procedure, and assuming that it properly appears from the record that there is no ordinance of the city providing for a license for the sale of intoxicating liquors, we are of the opinion that the objection is untenable. The power to license, regulate, and control does not confer the power to prohibit; but the charter provides that the city council shall annually vote upon the question as to whether a license shall be issued for the ensuing year, and, if the majority vote in the negative, no license can be issued during that time. While this provision is, in terms, confined to the matter of issuing the license, it was plainly intended to prohibit the sale in case of such negative vote. It certainly was never contemplated that in such a case the sale of intoxicating liquors should be permitted in the city without a license, and against the wishes of the municipality. The general policy of the state is against such a construction of the charter. The liquor traffic has always been deemed a matter of legislative control, and it has been the uniform practice since the organization of the state to make it a misdemeanor to sell liquor without a license. It is argued, however, that,

even if the power to prohibit exists, it can only be exercised by some ordinance to that effect. As a general proposition, this is true. But the provision of the charter requiring the council to vote upon the question of license or no license was approved February 15, 1901, and made it the duty of the council to take such vote at the first regular meeting after the passage of the act. The ordinance under which the appellants were convicted was passed March 12, 1901,—presumably after the vote had been taken, and after the council had determined that no license for the sale of liquors should be issued during the current year,—and is therefore, in effect, a prohibition of the sale. By its failure to provide a means by which a license could be obtained, the city has, in effect, said that no license shall be issued; and by the ordinance making it a misdemeanor for any person to sell without a license it has as effectually prohibited the sale as if the council had enacted a prohibitory ordinance in direct terms. The case of *State v. Hanley*, 25 Minn. 429, is very different from the case in hand. By the statute of Minnesota the voters of a village were authorized to determine for themselves whether a license for the sale of intoxicating liquors should be granted, and it was provided that, in case a majority of the votes be cast against the license, any person thereafter selling or disposing of liquors within the village should be deemed guilty of a misdemeanor, and punished accordingly. The people of the village of Kasson voted that no license should be granted, and the defendant was subsequently indicted for the crime of selling liquor within the village without a license. The court held the indictment insufficient because the defendant ought to have been charged, under the provisions of the act, with the offense of selling after the voters of the village had voted against granting a license. The question before the court was the construction of a local statute.

It follows from these views that the judgment of the court below must be affirmed, and it is so ordered. AFFIRMED.

Decided 2 December, 1901.

STEINER v. POLK COUNTY.

[66 Pac. 707.]

CONTRACT OF COUNTY—RATIFICATION.

A public corporation has the same power to ratify an unauthorized contract that an individual has, provided it is one that the corporation might have made in the first instance; and a ratification is equivalent to an original authorization.

From Polk: GEO. H. BURNETT, Judge.

Action by R. E. L. Steiner against Polk County. From a judgment in favor of plaintiff, defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *S. L. Hayden*, *Wm. H. Holmes*, and *J. E. Sibley*, with an oral argument by *Mr. Holmes*.

For respondent there was a brief over the name of *Butler & Townsend*, with an oral argument by *Mr. N. L. Butler*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

The plaintiff, a physician and surgeon, brought this action to recover \$125 for professional services rendered one Elroy Jackson, a resident of Polk County, who was severely injured in June, 1898, by a gunshot wound, necessitating the amputation of his leg. At the time of the injury Jackson was a minor, unable to provide himself with proper care or attention, and had no relatives or friends able or willing to help him. The case was of urgent necessity, and, as the county court was not in session, the judge thereof advised and recommended that he be taken to the Salem Hospital for treatment, and requested plaintiff to give him necessary medical attention, and present his bill to the county court; saying that he did not know what the court would do, but was satisfied it would allow a reasonable compensation for his services. In pursuance of this ar-

rangement, the plaintiff had Jackson removed to the hospital, provided with proper care and attention, and rendered him such professional services as were necessary. The county court thereafter allowed and paid bills for Jackson's care, board, and hospital charges, but upon the presentation of plaintiff's claim "for professional services rendered Elroy Jackson, in the sum of \$125," after "duly considering said matter," ordered "that of said account the sum of \$41.75 be, and the same is hereby, allowed, and that a warrant be drawn on the county treasurer for said sum in favor of the said R. E. L. Steiner, and that the sum of \$83.25 be, and the same is hereby, disallowed." The plaintiff refused to accept the amount allowed, and brought this action.

There is no controversy as to the value of the services rendered by plaintiff. It is admitted that he is entitled to recover, if at all, the full amount charged. The sole defense is that the county is not liable, because there never was any contract binding upon it to pay for such services. It is argued that a county is not bound by a contract made by its judge or any other member of the court in vacation for the care of a pauper, but that such contract must be made by the court in session, or by some duly authorized agent. We do not consider that question important here, because, after the contract or arrangement between the county judge and the plaintiff had been executed and the services rendered, the county court, in effect, ratified and approved the same. It paid bills for all incidental expenses incurred by the plaintiff, and when his claim for services were presented and under consideration it did not deny liability or repudiate the contract, but allowed thereon the sum of \$41.75; thus, in effect, recognizing its validity, objecting thereto only on the sole ground that the account charged was unreasonable. There could be no question, if the defendant were an individual or private corporation, that such an act would amount to a ratification; and we think the same result follows in the case of a public corporation. A county or other public corporation may, like an individual, ratify an unauthorized contract made in its behalf, if it is one the corporation

could have made in the first instance; and such ratification will be equivalent to original authority: 1 Dillon, Mun. Cor. (4 ed.) § 463; *Murphy v. City of Albina*, 22 Or. 106 (29 Pac. 353, 29 Am. St. Rep. 578); *People v. Swift*, 31 Cal. 26; *Boydston v. Rockwall Co.* 86 Tex. 234 (24 S. W. 272). The question as to whether the county judge had authority in the first instance to make a contract with the plaintiff or not is immaterial.

AFFIRMED.

Decided 12 November, 1901; rehearing denied 9 June, 1902.

BOYD v. PORTLAND ELECTRIC CO.

[7 Am. Electl. Cas. 661; 66 Pac. 576.]

LIVE ELECTRIC WIRES—INFERENCE OF NEGLIGENCE.*

1. In actions against electric companies for injuries received from contact with live wires in public ways proof of the breaking of the wires and of the happening of the accident makes a *prima facie* case of negligence: *Eshcry Cigar Co. v. Portland*, 34 Or. 282, applied.

INJURY BY LIVE WIRE—RES IPSA LOQUITUR.

2. Where plaintiff has made a *prima facie* case of negligence by showing that an accident happened resulting in his injury, he is not obliged to prove any specific negligence, though it may have been alleged, since the presumption is that the accident would not have happened had proper care been taken.

NEGLECT—QUESTION FOR JURY.

3. In an action against an electric company for injuries received from contact with a live wire, where plaintiff has made a *prima facie* case, and defendant has introduced evidence that the accident occurred without fault on its part, the question of negligence is for the jury.

NEGLECT—INSTRUCTIONS.

4. In an action against an electric company for damages caused by a broken live wire hanging in the street, where plaintiff alleged that defendant could have known and did know of the break in time to remedy the defect, but negligently omitted to do so, it was not error to submit to the jury the question whether the company was negligent in failing to discover the break.

*NOTE.—An extensive collection of recent electricity decisions on the proposition that certain conditions constitute *prima facie* evidence of negligence so as to require proof by the defendant in rebuttal may be found in 7 Am. Electl. Cas. 431-759, with notes by Mr. E. Q. Keasbey at pp. 446 and 757. See, also, notes in 31 L. R. A. at p. 576; 20 Am. St. Rep. at p. 490; 30 Am. St. Rep. at p. 736; 56 Am. St. Rep. at p. 67; 15 L. R. A. 33; 31 L. R. A. at p. 576; 39 L. R. A. 843 (briefs of counsel).

As to liability for negligent delay in removing or repairing broken or fallen wires, see 31 L. R. A. at p. 579.—REPORTER.

40	126
41	42
41	46
41	845
41	847

40	126
42	840

40	126
47	434
47	603n

40	126
48	442

ELECTRICITY—CARE REQUIRED—ACT OF GOD.

5. Where the poles and wires of an electric company are properly erected and maintained, and a storm of extraordinary severity, such as could not have been reasonably expected, causes a wire to fall, and it is not permitted to remain an unreasonable time in such condition, the company will not be liable for resulting damage; but if the storm is one that should have been anticipated, the company will be liable.

REMARKS OF COURT—HARMLESS ERROR.

6. In passing on the various matters necessarily incident to a trial a judge must make remarks in the presence of the jury that are not intended for their guidance, but the instructions are ordinarily sufficient to correct any impressions thus created.

REFUSING DUPLICATE INSTRUCTIONS.

7. Requested instructions that are fairly covered by the general charge are properly refused.

From Multnomah: *ARTHUR L. FRAZER*, Judge.

Action by R. B. Boyd against the Portland General Electric Company to recover for the loss of the services of his son, who was injured by one of defendant's wires. It is a case growing out of the same accident referred to in *Boyd v. Portland Elec. Co.* 37 Or. 567 and 41 Or. —. Plaintiff had judgment and defendant appeals. AFFIRMED.

For appellant there was a brief over the name of *Dolph, Mallory, Simon & Gearin*, with an oral argument by *Mr. Rufus Mallory*.

For respondent there was a brief over the name of *Dufur & Menefee*, with an oral argument by *Mr. E. B. Dufur*.

MR. CHIEF JUSTICE BEAN delivered the opinion of the court.

This is an action by R. B. Boyd against the Portland General Electric Company to recover damages alleged to have been suffered by him on account of an injury to his minor son from coming in contact with a live electric light wire. The defendant is a corporation engaged in supplying the City of Portland and its inhabitants with electric light, for which purpose it has put up poles along the streets, having cross-arms near the top, upon which its wires are stretched. The day before the accident, and while a storm was prevailing, two of the

wires on Magnolia Street became crossed at a point some one hundred and twenty-five feet west of Dakota Street, and about 6 or 7 o'clock in the evening the smaller one burned in two and hung down in two loops east of the break; one of them nearly reaching the ground two or three feet west of the pole at the intersection of the streets, where it swung directly over a path used by residents of the neighborhood. The other end remained suspended from the next pole, some one hundred and fifty feet west, and did not reach the ground. About the time, or soon after, the wire parted, the boy who was subsequently injured, a lad about eleven years of age, and an elder brother, passed the pole west of Dakota Street, noticed the broken wire at that place, and knew it was dangerous, but did not know anything about the other wire hanging down east of that point at the intersection of the streets. About 8 o'clock the next morning, the plaintiff, who resides on Dakota Street, some two hundred feet south of its junction with Magnolia, sent his son on an errand which required him to travel along the path near the light pole at the corner of the street, over which the wire was suspended. A few minutes later the boy was discovered lying on the ground, immediately under the broken wire, in an insensible condition, his right hand badly burned, while he was otherwise seriously and perhaps permanently, injured. No one witnessed the accident, and the lad was unable to give any account of how it occurred, but says he passed out of the front gate, and ran north along Dakota Street without looking up, after which he had no recollection of what occurred. It is admitted, however, that his injury was caused by contact with the broken wire. The negligence charged in the complaint is that the wire which parted and caused the injury was weak and defective, and not sufficiently attached or fastened to the pole, or properly stretched, or safely insulated, owing to which defects and weakness it broke and parted; that defendant could have known by proper diligence, and did know, at the time, or very soon after, the wire parted, and long before the injury occurred, that the wire was broken and swinging over and across the street, to the imminent danger of persons traveling thereon;

that, disregarding its duty, it failed and neglected to remove or repair the broken wire, or to give any warning of danger, but wrongfully and negligently permitted it to remain in such condition until after the injuries complained of were received.

The answer denies the negligence charged, and, for an affirmative defense, after alleging the contributory negligence of the plaintiff's son, avers that the wire which parted was one of the best known standard manufacture, and was placed upon the poles in a proper way; that a heavy storm prevailed during the afternoon of the sixth of December, the wind at one time reaching a velocity of sixty miles an hour, which the defendant believes forced the wire across a larger one on the cross-arm to the north of it, so that the friction of the wires caused the insulation to wear away, permitting them to come in contact; that between 6 and 7 o'clock in the evening the smaller one burned through and parted, and fell in loops across the other, as stated in the complaint; that, although defendant had the best known appliances in use at the time for detecting or discovering the grounding of its wires, it had no knowledge of such parting until notified of the accident to plaintiff's son, when, upon examination, it ascertained that neither end of the broken wire had come in contact with the ground, so as to form a short circuit, and therefore the fact of the wire having parted could not be indicated by its appliances. The reply put in issue the new matter alleged in the answer; and, the trial resulting in a verdict and judgment in favor of the plaintiff, the defendant appeals.

1. The plaintiff gave evidence tending to show when the wire which caused the injury to his son fell and the circumstances surrounding the accident, but gave no direct evidence of the specific acts of negligence charged in the complaint. The court, however, instructed the jury, among other things, that "in cases of this kind the law raises a presumption of negligence from the mere fact that the wire broke and the accident happened, because of the high degree of care which is required on the part of the person or corporation conducting

such business, and for reasons which I need not discuss here. What I mean by that is that if any evidence had been brought here that this wire was broken, and through the breaking of the wire this boy had been injured, and then nothing further had been introduced in the case,—no further evidence,—and the case was left there, it would be your duty to find for the plaintiff, provided you found, also, that he was not guilty of negligence on his part. That is what is called a *prima facie* case. Now, this may be rebutted by evidence on the part of the defendant, notwithstanding this presumption. If the defendant comes in and satisfies you that it did use ordinary care in building and maintaining and repairing this line, and that the accident occurred without fault on its part, then it would be your duty to find on that point for the defendant.” The giving of this instruction is assigned as error. The general rule of law is unquestioned that, excepting in cases where the defendant is an insurer, a party who charges another with negligence must prove it. But there are instances in which proof of an accident and the manner of its occurrence is sufficient to make a *prima facie* case, and to cast the burden on the defendant to show that it occurred without fault on his part. As a general rule, where the thing which causes injury is shown to be under the management of the defendant, and the accident is such as in the ordinary course of events would not happen if he had used proper care, it affords reasonable evidence, in the absence of a satisfactory explanation, that the accident arose from a want of care: *Esberg Cigar Co. v. City of Portland*, 34 Or. 282 (55 Pac. 961, 43 L. R. A. 435, 75 Am. St. Rep. 651, with note). This doctrine is held applicable in actions for injuries received from contact with a live electric wire in a public street. Electricity is a dangerous element, and those who make merchandise of it are legally bound to exercise that degree of care that will render its use reasonably safe; and, as the wires which convey it cannot safely be permitted within reach of travelers, a presumption arises, when they are found out of their proper place, that those having them in charge have been negligent. The courts

quite universally hold that proof that a live wire was down in a street and injury resulted therefrom is *prima facie* evidence of negligence: 2 Jaggard, Torts, 864; Joyce, Elec. Law, § 606; Keasbey, Elec. Wires (2 ed.), § 271; *Western Union Tel. Co. v. State, to use*, 82 Md. 293 (6 Am. Electl. Cas. 210, 31 L. R. A. 572, 51 Am. St. Rep. 464, 33 Atl. 763); *Haynes v. Raleigh Gas Co.* 114 N. C. 203 (5 Am. Electl. Cas. 264, 41 Am. St. Rep. 786, 26 L. R. A. 810, 19 S. E. 344); *Denver Consol. Elec. Co. v. Simpson*, 21 Colo. 371 (5 Am. Electl. Cas. 278, 31 L. R. A. 566, 41 Pac. 499); *Trenton Pass. Ry. Co. v. Cooper*, 60 N. J. Law, 219 (7 Am. Electl. Cas. 444, 38 L. R. A. 637, 64 Am. St. Rep. 592, 37 Atl. 730); *Snyder v. Wheeling Elec. Co.* 43 W. Va. 661 (7 Am. Electl. Cas. 473, 28 S. E. 733, 39 L. R. A. 499, 64 Am. St. Rep. 922, with note).

2. The defendant contends, however, that as the complaint in hand avers that the wire which caused the injury was weak and defective, and insufficiently stretched and fastened, the plaintiff was obliged to point out by his testimony some defects in the particulars alleged. But we are unable to concur in this view. The doctrine of "*res ipsa loquitur*" alluded to is a mere rule of evidence: 2 Thompson, Neg. 1227, *et seq.* It proceeds on the theory, as the term implies, that the happening of an accident under certain circumstances is of itself *prima facie* evidence of negligence, and, when it is evidence of the particular negligence charged in the complaint, the plaintiff is entitled to invoke the rule. Thus, in *Trenton Pass. Ry. Co. v. Cooper*, 60 N. J. Law, 219 (38 L. R. A. 637, 64 Am. St. Rep. 592, with note, 37 Atl. 730, 7 Am. Electl. Cas. 444, with note), the negligence averred was the insufficient bonding or fastening of the rails of a street railway, and it was insisted that the plaintiffs were obliged to point out and establish some particular defect or insufficiency as alleged. The court held, however, that the escaping of electricity from the rails was presumptive proof of the negligence alleged, thus bringing the case within the doctrine of *res ipsa loquitur*. In *Snyder v. Wheeling Elec. Co.* 43 W. Va. 661 (7 Am. Electl. Cas. 473, 39 L. R. A. 499, 64 Am. St. Rep. 922, with note, 28 S. E. 733), the

negligence charged was insufficient fastening, and, although the court held that no evidence of other acts of negligence was competent, it ruled that the mere fact that the wire fell created a *prima facie* presumption of negligence, sufficient to support the action unless rebutted by something appearing in the case. In *Denver Consol. Co. v. Simpson*, 21 Colo. 371 (5 Am. Electl. Cas. 278, 31 L. R. A. 566, 41 Pac. 499), the negligence charged was defendant's failure to properly construct its line, and its omission to take the necessary precautions to prevent the wires from falling. It was held that the fact that the wire had become detached from its fastenings and hung down in a public alley, so as to endanger public travel, was *prima facie* evidence of negligence on the part of the defendant, and an instruction to that effect was properly given. In the case at bar, it probably would have been sufficient, if the plaintiff had specified in the complaint generally the act or omission which he alleges to have been the proximate cause of the injury, and averred that it was negligently done or omitted. But, since the wire which caused the injury would not, presumably, have parted and fallen down, in the ordinary course of events, unless it was either defective or improperly stretched or fastened, it is reasonable to presume that its position in the street was owing to one or all of these causes. It must be assumed that a suitable wire, properly put up, would not be a menace to travelers on the highway; otherwise, the operation of a light plant by wires supported by poles in the streets of a city would be *ipso facto* a nuisance, and an unauthorized interference with the rights of the public. If, therefore, the wires break and fall down, that fact in itself affords reasonable evidence of negligence, either in the use of defective wires or in the manner of putting them up, and calls upon the defendant to show that it was without fault. It is, of course, true that in an action of this character the plaintiff cannot allege negligence in one particular, and upon the trial prove and recover upon another: *Lieuallen v. Mosgrove*, 33 Or. 282, 286 (54 Pac. 200, 664); *Jones v. City of Portland*, 35 Or. 512 (58 Pac. 657). But we do not understand that the instruction complained of conflicts

with this rule. It was confined to the inference or presumption to be drawn from the breaking of the wire and the happening of the accident, the proof of which was *prima facie* evidence that the wire was either weak and defective or improperly put up. The instruction, therefore, did not advise the jury that the plaintiff was entitled to recover on a ground of negligence not charged. The cases already cited illustrate the application of the doctrine of "*res ipsa loquitur*" where specific acts of negligence are charged in the complaint.

3. It is argued, however, that, if proof of the accident was sufficient under the pleadings to make out a *prima facie* case in favor of the plaintiff, it was overcome by the testimony of the defendant. But the weight, value, and credibility of such testimony were for the jury, and the court could not properly have taken the case from them on the ground that the defendant had shown by its employees that the accident occurred without fault on its part. In a recent case in New York, where a trolley wire fell, injuring a traveler, it was held that the presumption of negligence on the part of the company, arising from the fall of the wire and the happening of the accident, was not overcome by the evidence of interested persons that the supports were the best obtainable, that the line was frequently inspected, and an automatic device called the "breaker system" was in use, which, if properly adjusted, would automatically cut off the current if the wire touched the ground; the credibility of the witnesses and the sufficiency of the device being questions for the jury: *O'Flaherty v. Nassau Elec. R. Co.* 34 App. Div. 74 (54 N. Y. Supp. 96, 7 Am. Electl. Cas. 535). In *Uggle v. West End St. Ry. Co.* 160 Mass. 351 (35 N. E. 1126, 39 Am. St. Rep. 481, 4 Am. Electl. Cas. 389), the plaintiff was struck by part of an iron ear used to clasp a trolley wire and keep it in place around the curve over the defendant's track. There was no evidence of the defendant's negligence, except that the iron ear broke with the strain and one part of it fell, striking the plaintiff on the head. The verdict in his favor, however, was sustained, notwithstanding the defendant had introduced evidence tending to show that the

break was a clean one, bright in color and appearance; that the iron was sound all through, with no flaw or defect in it; that the whole apparatus was manufactured and put up by a manufacturer of the highest reputation; that the ear and guy constituted the best and strongest device known at the time for keeping trolley wires in place; that the defendant employed a competent corps of assistants, including foreman and superintendent, who inspected the whole line weekly, including the cars and every attachment; and that this particular part of the line had been inspected within a week prior to the accident.

4. It is next insisted that the court erred in instructing the jury that, "if the defendant had known of the breaking of the wire, it would have been its duty, under the high degree of care required of it under the circumstances, to have repaired it at the earliest possible moment, or at least as early as it could practically be done; but, if it did not know of the break,—and the evidence here, I believe, is undisputed that it did not,—the question for you to determine is whether, under the circumstances, it reasonably should have known, or should have provided means by which it would have known, of the breaking within that time, and within such a time that it could reasonably have repaired the break before the accident occurred. It is for you to determine whether or not it was guilty of a want of that high degree of care required of it in not providing means to find out whether this line had broken within this time. If you should find that company was negligent in this respect, then it would be responsible for the negligence, although it might not have been guilty of negligence in any other respect." The specific objection to this instruction is that there are no allegations in the complaint charging the defendant with negligence in failing to adopt necessary or proper means to ascertain whether the wire was broken; but, on the contrary, it is argued the complaint alleges that defendant did know of the break very soon after it occurred, and did not exercise due care and diligence in replacing and taking care of it. The language of the complaint is that defendant, its officers, agents, and employees, by proper diligence could have

known, and did know, very soon after the wire was broken, and long before the injuries complained of, that it was broken and hanging over the street, etc., and carelessly failed and neglected to remove or repair it, or to give any warning of danger, and wrongfully and negligently permitted the broken wire to remain in such dangerous condition until after the accident. It is not clear whether the pleader intended to charge negligence in not ascertaining that the wire had broken, or with negligence in not taking care of a broken wire; but the construction which seems to have been put upon the pleadings by the defendant in its answer, and by the court and parties throughout the trial, is that it charged negligence in not exercising reasonable care and diligence in ascertaining that the wire was broken, and we are of the opinion that the court did not err in submitting that phase of the question to the jury. Again, it is objected that this instruction assumes there was no evidence that the defendant had provided means, or used reasonable care and caution in providing means, for acquiring speedy information of a break in the wires. We do not consider this a reasonable interpretation of the language used by the court. It manifestly intended to, and did, submit to the jury, as a question of fact, whether the means which defendant had of ascertaining when a wire parted were such as proper care and diligence would suggest.

5. It is next asserted that the court erred in instructing the jury that "the defendant would not be liable for an act beyond its control and which could not reasonably be foreseen. It would not be liable for an accident caused by some unusual act of nature, or what is called an 'act of God,' if this could not have been reasonably foreseen and expected. As, for instance, suppose a stroke of lightning had occurred there, and broken one of these wires and thrown it down, and through that, and before the defendant had reasonable time in which to repair the break, the accident had occurred; that would have been something that could not reasonably have been foreseen, and for which the defendant could not be held liable. So, too, if this breaking, you should find, was caused by such an unusual

storm, unprecedented storm, or any act of God that could not be expected, such unusual storm as could not reasonably have been foreseen, something that had not been known to happen before in that way, then the defendant could not be held liable. But an ordinary storm, such as we have every winter, or nearly every winter, and which on that account ought to be expected to occur in any winter, would not excuse the defendant; that is, the mere fact that the injury was occasioned by the storm. The breaking of the wire, however, might occur during the storm, or at any other time, and not be the fault of the defendant. I simply, in giving you that instruction, refer to the storm alone." It is argued that this instruction is erroneous because it tells the jury, in effect, that if a storm caused the wire to part, and it was such a storm as happens in this country every winter, or nearly every winter, it would not be a defense, although it may have been in fact an extraordinary or unusual storm. The rule is that if the poles and wires of an electric company are properly erected and maintained and a storm of unusual and extraordinary severity, such as could not reasonably have been expected, causes a wire to fall, and it is not negligently permitted to remain an unreasonable time in such condition, the company will not be liable for an injury caused thereby; in other words, where the proximate cause of the injury is an external force, for which the company is not responsible, the question of liability will depend on whether the force was one that might reasonably have been anticipated. And this, it seems to us, is the rule laid down in the instruction complained of. It is true, certain statements made by the court in attempting to explain and elucidate the matter to the jury would, if taken from their context, seem to support the contention of counsel; but, when construed in its entirety, the instruction amounts to a statement that defendant would not be liable for the breaking of a wire caused by a storm of unusual and extraordinary severity, which could not reasonably have been anticipated, and this is the law upon the subject: Joyce, Elec. Law, § 450; Keasbey, Elec. Wires (2 ed.), § 236;

Mitchell v. Charleston L. & Power Co. 45 S. C. 146 (22 S. E. 767, 31 L. R. A. 577, 6 Am. Electl. Cas. 245).

6. After the case had been argued, counsel for the defendant requested the court to submit to the jury two special findings, the nature and character of which are not shown by the record. The request was denied, but during its consideration a colloquy between the court and counsel for the defendant ensued, a part of which is contained in the record, in the course of which the court stated, in effect, that the plaintiff's son was only required to exercise ordinary care, and was not obliged to keep his eyes on the full width of the street, and look at every point for an electric light wire, but had a right to assume that the street was free from such an obstruction, and to have his head down while traveling therein, unless he had reason to believe the wire was there. It is urged that this was error, because it indicated the opinion of the court upon the defense of contributory negligence pleaded in the answer. The question of contributory negligence was, of course, for the jury, and it was submitted to them under proper instruction. The statements of the court in reference to the propriety of submitting the special findings, although made in the presence of the jury, were not intended for their guidance, or as an announcement of the rule of law by which the question of contributory negligence should be determined, but were the reasons given for the court's denial of counsel's request, and, in view of the subsequent instructions, did not, in our opinion, prejudice the defendant's case with the jury.

7. Objection is also made to the refusal of the court to give certain instructions requested by the defendant on the subject of contributory negligence; but that phase of the question was fully covered by the general charge, and there was no error in such refusal.

Having thus disposed of the questions presented on this appeal, and finding no error in the record, the judgment is affirmed.

AFFIRMED.

Argued 23 October; decided 12 Nov., 1901; rehearing denied 6 January, 1902.

CONSER'S ESTATE.

WARREN v. HENDRICKS.

[66 Pac. 607.]

EXECUTORS—BOND AND OATH.

1. Where a will fixes the amount of the executor's bond at a sum that is reasonable in proportion to the value of the estate, and such bond has been given to the satisfaction of the county court, the executor need not take the oath prescribed by Section 1088 of Hill's Ann. Laws,* provided for in cases where the bond is dispensed with by the testator.

EXECUTORS—OBJECT OF NOTICE TO CLAIMANTS.

2. The object of Hill's Ann. Laws, § 1131, requiring every executor to publish a notice of the time and place for presenting claims against the estate is to give that information to interested persons, and the giving of such notice is not a prerequisite to the right of the executor to enter on the discharge of his duties.

CLAIMANTS AGAINST ESTATES—TECHNICAL OBJECTIONS.

3. A residuary legatee is not a claimant against an estate within the meaning of Section 1131 of Hill's Ann. Laws; but if he were, some injury must be shown before he will be permitted to object to the final account because some technical requirement has been imperfectly complied with.

NECESSITY OF INVENTORY—FINAL ACCOUNT.

4. The requirements of Section 1112, Hill's Ann. Laws, as to the filing of an inventory of an estate, should be substantially complied with, but if some of the property shall be omitted, or even if no inventory whatever shall be filed, the validity of the final account will not be affected if the property of the estate has been accounted for; in short, the settlement of a final account is to be determined by its own accuracy and completeness, and not by the inventory at all.

EFFECT OF NOT ENTERING ORDER.

5. Where an order has actually been made by a judge, the failure to enter it in the journal, or the loss of a paper on which the order was based, does not affect the good faith of the officer who acts under such an order.

*Sec. 1088. No executor or administrator is authorized to act as such until he shall file with the clerk of the county court having jurisdiction of the estate an undertaking in a sum not less than double the probable value of the estate, with one or more sufficient sureties, to be approved by the county judge, to be void upon the condition that such executor or administrator shall faithfully perform the duties of his trust according to law; *provided*, that when by the term of his will a testator shall expressly declare that no bonds shall be required of his executor, such executor may act upon taking an oath to faithfully fulfill his trust without filing the undertaking in this section mentioned; *provided further*, that such executor shall be criminally and civilly liable as other executors and administrators are for any dereliction of duty.

A SALE NOT A COMPOSITION.

6. A sale by an executor of a debt to a third person under an order of court is not a composition of the debt, though the sale is for less than the appraised value.

APPRAISED VALUE—LOSS—BURDEN OF PROOF.

7. Where there is any loss in value of the assets of an estate as shown by the inventory of the executor, the burden is on him to show that the loss occurred without fault on his part, but this is done when it appears that specified property brought all it was reasonably worth.

PLEADINGS ON OBJECTIONS TO FINAL ACCOUNTS.

8. A convenient practice in the settlement of final accounts in probate is to consider the issues as made by the account and the objections thereto, without requiring a reply by the executor.

OBJECTIONS TO FINAL ACCOUNT—SETTING ASIDE SALE.

9. On objections to the final accounting of an executor, a contention that the sale of real estate by him should be set aside because made for an inadequate sum cannot be considered, the purchaser not being a party to the proceedings, and there being no process by which he might be brought in.

From Lane: JAMES W. HAMILTON, Judge.

The last will and testament of Elizabeth Conser, deceased, having been admitted to probate, and T. G. Hendricks appointed executor in pursuance thereof, he prepared and filed an inventory and appraisement of the estate, setting forth various items of personal property, among which appears the following: "William Edris, W. P. Edris, K. S. Edris, one note, \$8,120, date February 7, 1894, payable on or before three years, interest 10 per cent. Credits. * * * Present value: Principal, \$6,600; interest, probable real value \$4,500, \$684.50." It also contains, among others, the following items of real property: Conser Block, on Ninth Street (with description), value \$8,000; store occupied by Ax Billy, etc., value, \$6,000. Subsequently, on December 5, 1898, the executor filed his final account, reciting, *inter alia*, that he had published notice to the creditors; that six months had elapsed since publication thereof; that all claims against the estate had been paid; that he had collected all outstanding notes that were good, had sold all the real property which he was authorized to sell, and that the estate was ready for final settlement. Among the items of money received are these: "Of Wolf and Rachel Sanders, from sale of Ax Billy store, \$5,450;"

“from sale of William Edris’ note, \$4,500;” “of Mrs. Shannon, for sale of Conser Block, \$6,750.” To this account Mrs. Mary E. Warren, the residuary legatee, interposed objections, assigning divers reasons; among others, that the executor did not give proper bonds or take an oath to faithfully fulfill his trust; that he neglected to publish notice to creditors, or to file proof of the same; that he failed to inventory all the property, and have it appraised as the law requires; and the form of the account is criticised as not charging the executor with the appraised value of the estate, rents, interest, and personal property not inventoried, and for failing to take credit for real and personal property on hand. Specifically, objections are made to the sales of real property to Wolf and Rachel Sanders and Elizabeth Shannon, because of want of authority in the executor to make them in the manner adopted, and attending irregularities, and of discrepancies between the appraised, which, it is alleged, was the real value and the sale value; it being sought either to have the sales set aside, or to charge the executor with the deficit in each instance. It is further objected that the Edris note was disposed of for a sum much less than its appraised and actual value, and that the executor should be charged with that deficit also. Then follow other objections going to various items of credit claimed. There was a reply and a trial, after which the court settled and allowed the account. The objector appealed to the circuit court, and, the decree of the county court having been affirmed, she now appeals to this court. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. W. C. Hale*.

For respondent there was a brief and an oral argument by *Mr. Geo. B. Dorris*.

MR. JUSTICE WOLVERTON, after stating the facts, delivered the opinion of the court.

1. The estimated value of the estate being \$45,000, it is objected that the executor did not properly qualify, so as to entitle him to enter upon the discharge of his trust; but the objection cannot avail, as the will fixed the amount of the bond at \$20,000, and a bond in that sum was executed and approved by the county court. This provision of the will was reasonable, and, the bond designated having been given, it was unnecessary to require the executor to take the oath prescribed in cases where the undertaking is wholly dispensed with.

2. There was a publication of notice to creditors, and the only real objection urged thereto is that the proof of publication was made by the publisher, and not by the printer or his foreman, and was not filed within six months. The statute requiring such notice is for the benefit of those having claims against the estate, that they might thereby be informed of the appointment of the executor or administrator, and of the time and place for the presentation of their demands to him; and is in no sense a prerequisite to his entering upon the discharge of his duties: Hill's Ann. Laws, § 1131.

3. The objector is not a claimant within the meaning of this provision; but, if she is, it is not apparent that she has been injured by the executor's imperfect compliance with the statutory requirements, and hence she cannot be heard to urge such objection against the settlement of the final account. This being so, it is unnecessary to consider whether the notice was filed in time, or the proof of publication properly made. If loss or inconvenience has befallen a claimant because of the irregular action of the executor in this regard, then the question might be pertinent; otherwise not.

4. Much criticism is directed against the inventory. It is claimed that a judgment of \$40 against Cochran & Campbell, 480.20 bushels of wheat disposed of by the executor and accounted for at \$240.17, and items of wheat, oats, and hay received as rent from the Cochran farm at \$36.80, were never inventoried or appraised. The first item was overlooked by

the executor, but we assume that the property described in the other two came into existence after the appointment, and was sold, and the proceeds accounted for. The statute makes it incumbent upon the executor or administrator, within one month after his appointment, or such further time as the court or judge may allow, to make and file an inventory and appraisal of the property of the estate, and if, after the filing thereof, other property shall come to his knowledge, or into his possession, that he shall inventory that also, and have it appraised: Hill's Ann. Laws, §§ 1112, 1119. The manifest object of the inventory and appraisal is to preserve a record of the property, and ascertain and determine its value, and the executor is properly chargeable, primarily, therewith at the value fixed. Undoubtedly, these provisions should be substantially observed; but, if they are not, provisions are elsewhere made by which the executor may be required to give proper heed to them. The judgment should have been inventoried and appraised, but as to the grain received as rent after his appointment it is not so clear that it was intended to be appraised. It was sold, the proceeds accounted for, and no complaint is made that it did not fetch a reasonable price. But, however that may be, the fact of a nonappraisal of certain property of the estate could not affect the validity of the final account if all the property received, or which by reasonable diligence should have been received, has been punctiliously accounted for. If there had never been any inventory or appraisal, and the executor had faithfully and economically administered the whole estate, and had fully and fairly accounted therefor, he would be entitled to an order settling his account and to a discharge. He may have been put to the trouble of showing the values with which he should be charged, but it would not affect the jurisdiction of the court to allow and settle his account.

5. The purpose of the objection to the Edris note transaction is apparent, and it should be remarked in this connection that a mortgage on realty was given to secure the note and accompanies it. It will be noted, however, that following the

item in the inventory are the words and figures: "Present value: Principal, \$6,600;" then follow, "Interest, probable real value, \$4,500, \$684.50." The inventory in the main is in type, but the words and figures, "probable real value, \$4,500," are interpolated, and were written by the appraisers at the time of making the appraisement. What was intended is not altogether clear, but the most reasonable interpretation is that it constitutes an appraisement of the note and interest accrued at \$4,500, and should be charged to the executor in the first instance at that sum. But, be that as it may, we will discuss the matter in both aspects, as the question subsequently arises as to whether the executor should be charged in his final account with the appraised value where he has disposed of the property at a less figure. There is much evidence in the record touching the disposition of this note and mortgage. G. R. Chrisman, one of the appraisers of the estate, testifies that after mature consideration the appraisers concluded that the proper value was \$4,500, and intended to appraise it at that figure. The executor says, in substance, that the note was not worth to exceed \$4,500; that before the decease of Mrs. Conser he had endeavored to sell it for \$5,000 without avail, and that \$4,500 was all he could obtain after repeated efforts; that before the sale thereof he petitioned for and obtained an order from the county court to sell it at private sale, and that it was disposed of in pursuance of said order. It is suggested that the petition was not filed with the clerk, nor was the order entered in the journal. If so, it was probably an oversight of some one, but does not affect the *bona fides* of the transaction on the part of the executor. George Midgley, the purchaser, testifies that he subsequently purchased Edris' right to the mortgaged premises, including other property, for \$1,650. It is difficult to say what amount of other property is included, but it must have been of considerable value, as it consisted of two lots, together with bolts, tools, ropes, etc. It appears that he commenced a suit to foreclose, and incurred some expense in that way, but finally settled the matter by purchasing Edris' equity of redemption in the mortgaged

premises and the other property at the figure named. Midgley is of the opinion that he gave the executor all the note and mortgage was worth. As opposed to this testimony, the objector produced R. M. Day, who testified that he offered \$5,000 for the note on the very day that Midgley purchased it, on condition that the executor would give him time to raise the money. That he was given from 11:45 in the morning until 3 o'clock in the afternoon, which was not enough for his purpose; that, if he had had more time, he could and would have raised that sum. He further states that the mortgaged property was worth \$10,000, but on further inquiry it developed that he did not know what property the mortgage covered, and that his estimate was made upon the supposition that it embraced more than it really did. Some effort was made to ascertain the rentals and the value of certain items with a view to arriving at its value, but the testimony is so indefinite and incomplete that it furnishes no satisfactory basis for intelligent deduction. Upon the whole, we are satisfied that the note and mortgage was disposed of for its reasonable value, and that the executor is not chargeable with any want of good faith, as it respects the transaction.

6. Nor can it be criticised as a compounding of the debt with the debtor. There was no agreement or understanding between the executor and Edris, the debtor, whereby the latter was to receive a discharge upon paying less than the full amount of the demand. There was a sale and transfer of the claim to a third party, and the payor continued bound, so that the elements consistent with the compounding of a debt are entirely wanting.

7. In this connection it is insisted that the executor has admitted, by failing to deny in his reply, that the note and mortgage was at the time of the appraisement and is now worth the sum of \$7,284.50, the amount at which it is averred the same was appraised; that he wrongfully sold the same for much less than its real value; that he is thereby precluded from showing anything to the contrary. Preliminarily, a few observations touching the accounting will be pertinent to this

and other inquiries made necessary by the record. The final account should be verified by the executor, who should charge himself with all the property of the estate which may have come into his possession at its appraised value, and he is not to profit by the increase or suffer loss on account of a decrease in value or destruction of the estate without his fault. It should contain a detailed statement of the amount of money received, and from whom, and the amount expended, and to whom paid, referring to proper vouchers for such payments, and the amount of money and property remaining unexpended: Hill's Ann. Laws, §§ 1173, 1177. For matters which the account should contain in detail, the practitioner and accountant may read and observe with profit the opinion of Surrogate McVean in *Re Jones*, 1 Redf. Sur. 263. It would seem that the appraised value, nothing further appearing, is the amount with which the executor should be charged; but it is not conclusive, and it is incumbent upon him, if there has been any loss, to show the cause thereof, so that the court can say that it was incurred without his fault, and thereby be enabled to extend him credit: *In re Jones*, 1 Redf. Sur. 263; *Mussey v. Sanborn*, 15 Mass. 155; *Underhill v. Newburger*, 4 Redf. Sur. 499; *Ex parte Jones*, 4 Cranch, C. C. 185 (Fed. Cas. No. 7,443).

8. The statute has not prescribed in what the pleadings attending an account should consist, and we know of no rule of practice that has been adopted in this state by which we may be governed. In New York, under a statute of similar trend to our own, it has been held many times that the account and the objections thereto represent the pleadings of the parties, and that the issues to be tried are to be determined therefrom, the objector being required to specify with convenient detail the particular items to which he takes exception, and state any matters of fact attending them upon which reliance is had for attaching liability to the executor: *In re Hart*, 60 Hun, 516 (15 N. Y. Supp. 239); *In re Heuser's Estate*, 87 Hun, 268 (33 N. Y. Supp. 837); *Frame v. Willets*, 4 Dem. Sur. 368; *Peck v. Sherwood*, 56 N. Y. 615. This seems to be a convenient

practice, and one well calculated to subserve the ends of truth and justice; and we see no good reason for going beyond it and requiring a technical reply of the executor or administrator, whereby he must deny or avoid a matter stated by the objector, as by the rules of pleading adapted to ordinary suits or actions. There is therefore no good reason for holding that the executor has admitted the truth of the objector's allegations by not denying them. The executor having shown that he obtained for the Edris note and mortgage all that they were reasonably worth, he should not be charged with anything beyond the amount received, and it makes but little difference whether it was appraised for that sum or for \$7,284.50. If for the latter, he should be charged with the amount in his account and credited with the deficit.

9. We come now to the Conser Block and the Ax Billy store items. It is urged as to those that the executor was without adequate authority to sell in the manner employed, and therefore that the sale should be set aside, or that the executor be required to account for the difference between the sale price and the appraised value. It is not a matter pertinent for inquiry upon a final accounting whether the sales of realty have been authorized and regularly made with a view of determining their validity. The purchaser is not ordinarily a party to the proceeding, nor is there any process by which he may be brought in, and the proceeding is wholly inappropriate for the purpose; so that the suggestion to set aside the sale is without merit. The Ax Billy store was sold at public auction, after giving notice for the time and in the manner as provided by law for sales upon execution, for the sum and price of \$5,450. A report was made to the county court, whereby it was shown that the price paid was reasonable; but the order of the court respecting it, while it takes notice of the sale, does not seem to have expressly affirmed it. The Conser Block was disposed of at private sale, and the report thereof shows that the executor had previously advertised the same for sale at public auction in manner as prescribed by law for sales upon execution, but had failed to obtain bidders;

that the price received was not unreasonable; and that another sale would not bring ten per cent. additional and costs. There was an order of the court expressly affirming the sale, and reciting, in effect, that the consideration received was reasonable. But slight reference is made to these sales in the testimony. Mr. Hendricks says that he was never offered anything above the figures named for the property, and that the piece of realty sold to Mrs. Warren, the objector herein, was the only cheap piece of property sold, thus leaving an inference that the other property brought at least its approximate value. While the evidence in explanation of the deficits is meager, we are fully satisfied that the property was disposed of for what it was reasonably worth, and that the executor should have credit in his account for such deficits. There is a difficulty attending the matter by reason of the fact that the executor does not attempt in his account to show any cause for the discrepancies between the appraised values and proceeds of sales, or that the property brought all that it was reasonably worth, so as to afford a basis for the credit; but, as there was no objection interposed to the testimony offered on this account, we are warranted in affirming the findings of the court below in allowing credit for the difference.

Some other items objected to may now be noticed in detail. M. L. Hendricks preferred a claim of \$206.25 against the estate for cutting fifty acres of brush at \$4 per acre, and five days' labor at grubbing at \$1.25 per day. This was allowed and paid by the executor, and the objections to it are that there was no such contract, as indicated by the proof, and no service rendered; but the evidence is clear to the contrary, and the credit was properly allowed. Another item is that of the M. L. Coleman claim for \$107, allowed and paid, \$100 of which is objected to; but the action of the executor was fully warranted in the light of the evidence adduced at the trial. George B. Dorris was allowed \$500 for services as attorney for the estate. This was objected to as exorbitant. Attorneys of understanding and experience were called touching the allowance, and fully established its reasonableness. The executor's charge of

\$1,000 for the settling of the estate is a matter fixed by the terms of the will. It is insisted that no compensation of the kind should be allowed upon the ground that he wilfully mismanaged his trust, but there is no evidence of this whatever, and the objection is wholly without substantiation. The form of the account is not to be commended, and perhaps a restatement of it should have been required; but, notwithstanding, the county court has settled it, and we see no good reason for disturbing the decree now.

AFFIRMED.

Argued 6 November; decided 2 December, 1901.

McMAHAN v. CANADIAN RAILWAY COMPANY.

[66 Pac. 708.]

PLEADING AND PROOF—FAILURE OF PROOF.

1. Parties must succeed or fail in legal proceedings as the proofs correspond with or differ from the pleadings, and where the evidence is of a fact different from the one alleged there is a fatal failure of proof: as an example, where plaintiff pleaded a parol agreement, but on the trial admitted the execution and validity of a written contract for the same services, radically different from the alleged oral one, the pleadings and proof did not correspond, and a nonsuit was properly granted.

RATIFICATION OF ACTS OF AGENT.

2. Where agents of a railway company, not authorized to make contracts for newspaper advertising, arranged to have advertisements inserted in a newspaper, and to have copies forwarded to the general passenger agent, who had authority to make such contracts, in pursuance of which arrangement the advertisements were inserted, and copies of the publication and monthly statements of account were forwarded to the general passenger agent, there was evidence from which the jury might infer that the agreement was ratified by him.

From Marion: GEO. H. BURNETT, Judge.

Action by L. H. McMahan against the Canadian Pacific Railway Company. From a judgment in favor of defendant, plaintiff appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Messrs. Samuel T. Richardson and John A. Carson.*

For respondent there was a brief over the names of *Brown,*

Wrightman & Myers and Geo. G. Bingham, with an oral argument by Mr. Jefferson Myers and Mr. Bingham.

MR. JUSTICE WOLVERTON delivered the opinion of the court.

The complaint contains two counts, by the first of which it is alleged that between November 7, 1891, and March 1, 1893, the plaintiff printed and published, at the special instance and request of the defendant, certain advertisements in the Woodburn Independent, at the agreed price of \$218.30, which the defendant undertook to pay by furnishing plaintiff transportation over its lines of railroads and steamships as he should desire; that about April 10 it furnished transportation to the amount of \$77.70; that subsequently plaintiff demanded transportation of the defendant in the further sum of \$140.60, being the balance due, which was refused; and that \$218.30 is the reasonable value of the services rendered. By the second count it is alleged that the Independent Publishing Company, then the publisher of the Daily Independent, and the Oregon Independent, printed and published, at the request of defendant, in said newspapers, certain advertisements between March 10 and April 15, 1894, which service is of the reasonable value of \$411.75; that during said time the publishing company rendered monthly statements to the defendant of the work performed; that no objections were made thereto; and that the claim was duly assigned to plaintiff. These allegations are specifically denied by the answer, which contains a further defense setting up a contract entered into between plaintiff and defendant about May 1, 1892, whereby it was agreed that plaintiff should, for the period of one year, publish advertisements in the Woodburn Independent, comprising a space of six inches, payments to be made at the rate of \$9 per month, in transportation over the rail lines of the defendant; that in pursuance thereof plaintiff published advertisements for the period of ten months, and no longer; that the defendant on March 31, 1893, furnished plaintiff transportation to the amount of \$107.10; and that the contract is the same as that referred to in the complaint. The issues having been formu-

lated, a trial was proceeded with before a jury; and, when the plaintiff's evidence was in, a nonsuit was granted on motion of the defendant, and the plaintiff appeals.

A judgment of nonsuit having been given on defendant's motion, we must look to the record to ascertain whether the proofs were such that the jury might reasonably have drawn an inference therefrom of defendant's liability under the allegations of the complaint. A careful examination of the testimony shows that there are two questions involved. The first is as to whether the proofs tend to establish the cause set out in the first count, the basis of which is, by the plain intendment of the pleading, an express contract. The other pertains to the second cause, and involves the inquiry whether the jury could have reasonably inferred from the testimony adduced that plaintiff's assignor had the requisite authority from the defendant to incur the liability sued on, or that it ratified the transaction.

1. The plaintiff produced Jacob L. Mitchell as a witness, who testified, in substance, that he was an agent of the Canadian Pacific Railway, and that by his arrangements with the company he was authorized to solicit patrons for its railway lines. When a ticket was desired, he was required to forward the money therefor to the company's office at Vancouver, British Columbia, whereupon an order was sent to him upon the company's ticket agent at Portland or Huntington, as might be convenient, and the patron would be supplied in this way. No tickets were intrusted to him for sale directly. His authority extended also to the establishment of other agencies throughout the Willamette Valley of similar character to his own, but under his supervision Mitchell applied to the plaintiff at Woodburn, Oregon, who was then the publisher and proprietor of the Woodburn Independent, to ascertain his rates for advertising; and, upon being informed touching the matter, he sent to the company for and obtained a contract, which he sent to the plaintiff, and had it signed. This contract bears date May 1, 1892, was admitted by the plaintiff to have been executed by him, and was offered in evidence upon his cross-

examination, the effect of which is that he, in consideration of transportation to be furnished by the defendant to the value of \$9 per month, agreed to publish in the Woodburn Independent, when called upon to do so, display advertisements, for one year, commencing March 1, 1892, at the rate of \$1.50 per inch for a six-inch space, and to send to the general passenger agent of the railway company at Montreal, Canada, and to D. E. Brown, Vancouver, British Columbia, a copy of the paper in the meanwhile. In further proof of the allegations of the first count, plaintiff testified that Mitchell applied to him in November, 1891, and made arrangements with him whereby he should insert certain advertisements and reading notices in his paper, in consideration whereof he was to be furnished with transportation over the lines of the company, and that in pursuance of such agreement he inserted a five or six-inch advertisement, commencing with the issue of the paper of November 7, 1891, which was continued until March 1, 1893; that the rate for this work was \$9 per month; that in addition thereto he inserted locals in his paper from time to time at the agreed rate of ten cents per line, amounting to \$21.60, and that he did other advertising, which, together with such locals and the display advertisement alluded to, amounted to \$218.30; that the services rendered were reasonably worth that amount; and that he has received in transportation the sum of \$77.70, and no more. He further testified that as to the balance he has demanded of the company transportation, but has been refused, and hence claims that the amount of such balance is due him in cash.

It is not very clear from the testimony what other advertising the plaintiff did for the defendant, for which he has made the charge of \$218.30, except the item of \$21.60 for locals, and the display "ad" running from November 7, 1891, to March 1, 1893, which two items would amount to \$181.60 only. But this circumstance is not very material, in the view we have taken of the matter. The plaintiff first claimed in his testimony that he had no written contract whatever with the defendant for the services to be rendered, and the complaint

was drawn, no doubt, with that idea in view; but, when the contract above alluded to was produced, he admitted its execution, and, being in writing, it must be considered to have been the only contract in the premises, and as superseding any verbal arrangements that may have been entered into between the parties touching the matters of which it speaks. It sets forth specifically the terms and conditions relating to the services to be rendered, and the compensation to be paid. The complaint counts upon an entirely different and distinct contract,—so much so that it could never be mistaken for the written one introduced in evidence, and admitted to be the true contract between the parties. The result is that there is a failure of proof of the contract or cause of action relied upon by the plaintiff. It is not permissible, under the settled rules of pleading and practice, for a party to sue upon one contract and recover upon another; and, where the contract apparently established by the proofs is different from the one sued on, there is, without doubt, a failure of proof to establish the cause of action. In such an event, where the plaintiff does not procure leave to and amend the complaint so as to make it conform to the proofs, it is proper to grant a nonsuit: *Tomlinson v. Monroe*, 41 Cal. 94; *Johnson v. Moss*, 45 Cal. 515. So that, as to the first count, it was properly granted.

2. The second count is based upon advertising done by the Independent Publishing Company at the instance of the defendant. As to this the evidence tends to show that the plaintiff, who was then the agent and manager of the publishing company, went to the office of Mitchell, in Salem, and solicited the business; that Mitchell authorized him to insert a display advertisement, embracing a six-inch space, in the Daily and Semiweekly Independent, the rates for which were \$3 per week for the daily, and \$2 for the semiweekly; that the advertisement was continued from March 10, 1893, to April 1, 1894; that in the meantime he published an article consisting of two hundred and nine lines at the especial request of Mitchell and one Nuckey, a traveling and passenger agent of the defendant; that they took the article to the publishing company's office,

and directed its insertion. Mitchell further testified that his manner of obtaining advertisements in local papers in behalf of the defendant was to ascertain the rates from the publishers, advise the company touching the matter, and request that the advertising be done, whereupon, if it thought favorably, it supplied him with a contract, and this he had signed by the publisher, and the work was then done in obedience to such contract; that he did not undertake to bind the defendant without proper authority; that all he did was simply to negotiate with the publishers, and the contracts were made by its other officers; and that he did not undertake to bind the company, except through them. Nuckey worked under instructions from the assistant general passenger agent, and, beyond what authority he derived from that source, he had none. In this connection it must be observed, however, that plaintiff testified that Mitchell and Nuckey both instructed him, as the agent of the publishing company, to send one copy of both publications, when the advertisements were inserted, to the head office, at Montreal, Canada, and another to Mr. Brown, the district general passenger agent, at Vancouver, British Columbia; that in pursuance thereof the publications were mailed as directed during the continuance of the advertisement, and besides that he sent to D. E. Brown, the district general passenger agent at Vancouver, monthly statements of accounts, showing the services rendered and the amount charged.

While there is no acknowledgment of the receipt of any of these papers or statements of account shown, it appears that the plaintiff wrote to the company after the services had been fully rendered, making a claim therefor; and the district general passenger agent of the company at Vancouver, British Columbia, without denying any liability, requested to have an itemized statement of the claim made out and forwarded to him. This is, in substance, the evidence tending in any respect to indicate by what authority the publishing company performed the services for which the action is brought. While it is apparent that Mitchell had no authority from the company to direct the insertion of the advertisements, and it is not clear that Nuckey was authorized thereto, yet, when it is

shown that copies of the papers were forwarded to the superior officers of the company as directed by them, and monthly statements of account for the services rendered were also forwarded to the district general passenger agent at Vancouver, we are impressed that there is sufficient in the record from which the jury might reasonably have inferred the requisite authority to do the work. There was evidence tending to show a ratification, if the authority of Mitchell and Nuckey was not adequate to the purpose in the first instance, by not having disclaimed liability when the company was advised of what was transpiring. In this view, the case should have gone to the jury on the second count.

The judgment will therefore be reversed, and the cause remanded for such further proceedings as may seem appropriate.

REVERSED.

Argued 6 November; decided 2 December, 1901.

BOOTH'S WILL.

[61 Pac. 1185, 66 Pac. 710.]

40	154
46	332
46	583

RULES OF COURT—ADVANCING FOR ARGUMENT.

1. A case involving solely the construction of a will wherein only private persons are interested does not involve any question of "public importance" as that expression is used in Rule 16 of the supreme court, justifying a hearing out of its regular order.

STATUTES—REPEAL BY IMPLICATION.

2. A subsequent act, not covering the entire ground of an earlier act, and not clearly intended as a substitute for it, does not repeal such earlier act, unless its provisions are so repugnant to it that both cannot stand.

REVOCATION OF WILL BY MARRIED WOMAN—STATUTES.

3. Section 3072, Hill's Ann. Laws, providing that the will of an unmarried woman shall be deemed revoked by her subsequent marriage, has not been impliedly repealed by Section 780, Hill's Ann. Laws, declaring that a written will cannot be revoked otherwise than by another written will, or canceled or destroyed by the testator himself or by another person in his presence, the latter section having reference only to revocation by some direct act of the testator; nor by section 2992, removing the common-law disabilities of married women, and vesting them with complete control of their property as though unmarried; nor by section 2998, declaring that all laws which impose or recognize civil disabilities in a wife not imposed or recognized as existing as to the husband are thereby repealed; and section 3072 is still in force.

From Marion: REUBEN P. BOISE, Judge.

In September, 1888, Verena Wischer, an unmarried woman, over eighteen years of age, and of sound mind, executed her will in due form. Thereafter she married John C. Booth. No children were born of this marriage. Mrs. Booth died in January, 1899, and Mr. Booth in December of the same year. The question now is whether Mrs. Booth's property shall be disposed of under her will or under the statute—in other words, was the will revoked by the subsequent marriage of its maker. The county court admitted the will to probate, but that order was reversed by the circuit court, from which decree the proponents appeal.

AFFIRMED.

Decided 23 July, 1900.

ON MOTION TO ADVANCE FOR HEARING.

Submitted without oral argument.

PER CURIAM. 1. The motion to advance in this case must be denied. It is a civil action, involving no question of public importance, and, under Rule 16 of the Supreme Court of Oregon (35 Or. 587, 600) must come up for argument in the order of its entry on the trial docket. An early hearing is no doubt important to the immediate parties litigant; but the same is probably true of the other cases entitled to precedence over it, and it would be unjust to them to advance it out of its order.

MOTION OVERRULED.

Decided 2 December, 1901.

ON THE MERITS.

For appellant there was a brief over the names of *Wm. M. Kaiser, Woodson T. Slater, Tilmon Ford*, and *F. A. Turner*, with an oral argument by *Messrs. Slater and Ford*.

For respondent there was a brief over the names of *D. R. N. Blackburn and Brown, Wrightman & Myers*, with an oral argument by *Mr. Blackburn and Mr. J. N. Brown*.

MR. CHIEF JUSTICE BEAN delivered the opinion of the court.

The single question presented on this appeal is whether the will of an unmarried woman is revoked by her subsequent marriage. The statute (Hill's Ann. Laws, § 3072) passed in 1853, and continued in force by the constitution, Art. XVIII, § 7, expressly so declares. But it is contended that it has been repealed by sections 780, 2992, and 2998, which read as follows:

"A written will cannot be revoked or altered otherwise than by another written will, or another writing of the testator, declaring such revocation or alteration, and executed with the same formalities required by law for the will itself; or unless the will be burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person, in his presence, by his direction and consent; and when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses." Section 780.

"The property and pecuniary rights of every married woman at the time of her marriage, or afterwards acquired by gift, devise, or inheritance, shall not be subject to the debts or contracts of her husband, and she may manage, sell, convey, or devise the same by will to the same extent and in the same manner that her husband can property belonging to him." Section 2992.

"All laws which impose or recognize civil disabilities upon a wife which are not imposed or recognized as existing as to the husband are hereby repealed; *provided*, that this act shall not confer the right to vote or hold office upon the wife, except as is otherwise provided by law," etc. Section 2998.

2. It will be observed that there is no express repeal by the sections quoted of section 3072, and therefore, if repealed at all, it is by implication. But before an act not covering the entire ground of an earlier one, nor clearly intended as a substitute for it, can have the effect of repealing a former statute, it must appear that its provisions are so repugnant to the other that both cannot stand. It is a reasonable presumption that

all laws are passed with knowledge of those already existing, and that the legislature does not intend to repeal a statute without so declaring. It is therefore the duty of the court to adopt any reasonable construction that will give effect to both acts, and, in order that one may have the effect of repealing another by implication, its conflict with the former act must be "so positive as to be irreconcilable by any fair, strict, or liberal construction of it, which would, without destroying its evident intent and meaning, find for it a reasonable field of operation, preserving, at the same time, the force of the earlier law, and construing both together in harmony with the whole course of legislation upon the subject": *Endlich*, *Interp. Stat.* § 210; *Bower v. Holladay*, 18 Or. 491, 496 (22 Pac. 553); *Winters v. George*, 21 Or. 251 (27 Pac. 1041). Unless, therefore, the provision that a will made by an unmarried woman shall be deemed revoked by her subsequent marriage is so repugnant to sections 780, 2992, and 2998 that it cannot stand without destroying their intent and purpose, it must be regarded as valid, however inconsistent in principle it may appear.

3. Now, section 780 is a part of the chapter on evidence, and has reference alone to the revocation of a will by some direct act of the testator, and not by inference of law from his acts or conduct: *Schouler, Wills* (2 ed.), § 380. It is substantially the same as the English statute of frauds (29 Car. II. c. 3, § 6), notwithstanding which the English courts have uniformly held that the marriage of a woman absolutely revoked her will, and the marriage of a man and birth of a child had the same effect: 1 *Jarman, Wills* (6 ed.), *110; 1 *Redfield, Wills*, *294. So there is no room for the contention that section 3072 was repealed by section 780.

This brings us to a consideration of the effect of sections 2992 and 2998. At common law a woman lost the control and disposition of her property and her testamentary capacity by her marriage, and therefore a will previously made by her was revoked: *Schouler, Wills* (2 ed.), § 424. Recent legislation in many of the states in this country, however, has removed the common-law disabilities of married women, and vested them

with the complete control and disposing power over their property, the same as if unmarried; and it is generally held that the effect of such legislation is to abrogate and annul the common-law rule, because it removes the reason upon which it was founded, and substitutes an entirely new principle and policy: *Chapman v. Dimer*, 14 App. D. C. 446; *Appeal of Emery*, 81 Me. 275 (17 Atl. 68); *Noyes v. Southworth*, 55 Mich. 173 (20 N. W. 891, 54 Am. Rep. 359); *Fellows v. Allen*, 60 N. H. 439 (49 Am. Rep. 328); *In re Ward's Will*, 70 Wis. 251 (35 N. W. 731, 5 Am. St. Rep. 174); *Roane v. Hollingshead*, 76 Md. 369 (25 Atl. 307, 17 L. R. A. 592, 35 Am. St. Rep. 438*); *Webb v. Jones*, 36 N. J. Eq. 163; *In re Tuller's Will*, 79 Ill. 99 (22 Am. Rep. 164). But not a single case has been brought to our attention holding that such legislation repeals a positive statute declaring that a will made by an unmarried woman shall be deemed revoked by her subsequent marriage, nor do we think one can be found, because there is no inconsistency in fact between the two laws. As said in *Loomis v. Loomis*, 51 Barb. 257: "A case cannot be imagined where they can ever come in conflict. The first act, on the marriage of a woman, revokes a will made by her before marriage. The last * * * gives a married woman a right to receive and hold separate property, and carry on separate business, and have her earnings, and to sell, convey, devise, and will her separate property,—entirely separate and distinct things, having no connection with or relation to each other." Both New York and Pennsylvania have statutes providing that the will of an unmarried woman shall be revoked by her subsequent marriage, and Massachusetts has one, which, as construed by its courts, has the same effect. In each of these states it has been expressly held that subsequent legislation conferring upon a married woman the right to sell, convey, and devise her property as if unmarried did not repeal the previous statute: *Loomis v. Loomis*, 51 Barb. 257; *Lathrop v. Dunlop*, 4 Hun, 213; *Brown v. Clark*, 77 N. Y. 369; *In re Kaufman*, 131 N. Y. 620 (30 N. E. 242, 15

*NOTE.—Revocation of a Woman's Will by her Subsequent Marriage.

L. R. A. 292*); *In re McLarney's Will*, 153 N. Y. 416 (47 N. E. 817, 60 Am. St. Rep. 664; *Swan v. Hammond*, 138 Mass. 45 (52 Am. Rep. 255); *In re Fransen's Will*, 26 Pa. 202; *In re Craft's Estate*, 164 Pa. 520 (30 Atl. 493); *Appeal of Martin*, 164 Pa. St. 520.

In *Brown v. Clark*, 77 N. Y. 369, Mr. Justice ANDREWS, in discussing the question says: "The language of the statute that the will of an unmarried woman shall be deemed revoked by her subsequent marriage is the declaration of an absolute rule. The statute does not make the marriage a presumptive revocation, which may be rebutted by proof of a contrary intention, but makes it operate *eo instanti* as a revocation.

* * * It is claimed by the contestants that the testamentary capacity conferred upon married women by the recent statutes in this state takes away the reason of the rule of the common law, and that upon the maxim, '*Cessante ratione legis, cessat lex ipse*,' the rule should be deemed to be abrogated. Upon the same ground it might have been urged at common law that the marriage of a *feme sole* should only be deemed a revocation or suspension of her prior will during the marriage, and that when the woman's testamentary capacity was restored by the death of her husband leaving her surviving the will should be revived; but the contrary was well settled. * * * But the courts cannot dispense with a statutory rule because it may appear that the policy upon which it was established has ceased. The married women acts confer testamentary capacity upon married women, but they do not undertake to interfere with or abrogate the statute prescribing the effect of marriage as a revocation. It was quite consistent that the legislature should have intended to leave the statute of 1830 in force, although the new statutes took away the reason upon which it was based. The legislature may have deemed it proper to continue it for the reason that the new relation created by the marriage would be likely to induce a change of testamentary intention, and that a disposition by a married woman of her property by will

*NOTE.—Meaning of word "unmarried."

should depend upon a new testamentary act after the marriage." And in *Re McLarney*, 153 N. Y. 416 (60 Am. St. Rep. 664, 47 N. E. 817), in referring to the same matter, Mr. Justice O'BRIEN remarks: "This rule was incorporated in our statute law * * * at a time when a married woman was incapable of making a will, and, of course, it was not intended to have any application whatever to testamentary instruments made during coverture. Since the disabilities of married women to dispose of property by will have been removed in this state by legislation, the reason of the rule no longer exists, though it remains a part of the statute law. It has been held by this court that it was not abrogated by the subsequent legislation conferring testamentary capacity upon married women and removing the reason of the rule at common law. The courts cannot dispense with a statutory rule merely because it appears that the policy upon which it was established has ceased. The legislature might very properly remove it from the statute book by repeal, but in the meantime it cannot be disregarded by the courts." It is clear, therefore, that section 3072 is not repugnant in fact to subsequent legislation removing the disabilities of married women, and that it cannot be disregarded by the court so long as it remains unrepealed. It may seem unnecessary and inexpedient that a woman's will should be revoked by her marriage, when she still retains the full control and disposition of her property, and may thereafter make and revoke wills at her pleasure. But we are not the judges of the wisdom or expediency of legislation, nor have we authority to declare a statute repealed on such grounds.

Especial stress is laid on section 2998. That section, however, is applicable alone to married women. It was intended to repeal all laws which impose or recognize civil disabilities upon a wife which are not imposed or recognized as existing as to the husband, except the right to vote or hold office; and so it has been construed in *King v. Voos*, 14 Or. 91 (12 Pac. 281); *Ingalls v. Campbell*, 18 Or. 461 (24 Pac. 904); *First Nat. Bank v. Leonard*, 36 Or. 390 (59 Pac. 873). But, before a woman can be brought within the operation of this statute,

she must assume the status of a wife. The rights or powers of a single woman are not affected by it, and we are aware of no rule of construction under which it can be held to have interfered with or abrogated the statute declaring the effect of her marriage upon a previous will. We have no alternative but to enforce the law as we find it upon the statute books, and to hold that the will of an unmarried woman is revoked by her subsequent marriage.

These views lead to the affirmance of the decree of the court below, and it is so ordered. **AFFIRMED.**

WOLVERTON, J., being related to one of the parties, took no part in the decision.

Decided 25 November, 1901.

MILLER v. INMAN.

[66 Pac. 713.]

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48	444
40	161
46	544

MASTER AND SERVANT—NEGLIGENCE—SAFE PLACE TO WORK.

1. A sawmill employee was required to clear away the trimmings and sawdust between one of the saws and the wall, four or five feet distant. Over this space, and within less than four feet of the floor, a line shaft revolved at the rate of five hundred revolutions a minute, and at the end of the shaft near the wall was a projecting bolt used in splicing the shaft. In stooping under the shaft at the time in question to remove the trimmings, the employee was caught, whirled around the shaft, and killed. *Held*, that the employers were negligent in leaving the projecting bolt in such a position, as it increased the danger unnecessarily.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.

2. A sawmill employee required to work under a revolving line shaft was caught on a projecting bolt, whirled around the shaft, and killed. The bolt was not visible when the shaft was in motion, owing to the rapidity of its revolutions, and there was no evidence that he had ever seen the shaft at rest, or knew its condition. *Held*, that no contributory negligence was shown, the employee not being required to look out for such defects.

UNSEEN ACCIDENT—CAUSE OF INJURY.

3. A sawmill employee was killed while working under a revolving line shaft. The shaft was in two pieces, joined by couplings held together by bolts and nuts. One of the bolts projected from the nut. No one saw the employee caught in the shaft, but two fellow employees saw him immediately afterwards, and testified that he was being whirled around the shaft near the coupling, and some of his clothing was found wrapped around the coupling. *Held* sufficient to show that the projecting bolt caused the injury.

From Multnomah: **ALFRED F. SEARS, JR., Judge.**

This is an action by Marie Miller, as administratrix of the estate of F. J. Miller, deceased, against Inman, Pouison & Company, a private corporation, to recover damages for negligence, causing the death of the said F. J. Miller. For convenience a photographic reproduction of the premises is herewith presented.

The deceased was working about and under a shaft in which there was a coupling from which projected a bolt and nut. In some way his clothing was caught on this nut, he was drawn under the shaft, against a wall just back of it, and killed. In the figure, AA represents a line shaft three feet above the floor; BB represents a coupling; C represents a pulley over which a ten-inch belt F was running; and H is the wall eighteen inches back of the shaft A. Certain blocks which had been cut by the saw were lying under the shaft and against the wall H, about the point G; and the deceased was engaged in taking out these blocks.

The plaintiff claimed that the deceased was squatting under the shaft AA, facing the saw shown in the cut, and that in throwing out the blocks from the angle made by the floor and the wall H, his right shoulder was caught by the projecting bolt shown near the letter B, whereby he was dragged under the shaft, which was running at the speed of five hundred revolutions a minute, and against the wall and killed.

The defendant claimed that the deceased was working in a loose jumper pulling out the blocks from the angle G back of the shaft, and his clothing was caught on the belt F, whereby he was thrown under the pulley and around onto the coupling BB, where his clothes were caught by the projecting screw; that it was negligence to get against the pulley which was open and in plain sight. It was also contended that if deceased was in the position claimed by plaintiff, he was there needlessly, because he had been furnished with a rake to draw out the loose blocks, and he was negligent in getting under the shaft. There was a judgment for plaintiff, from which defendant appeals.

AFFIRMED.

For appellant there was a brief over the name of *Dolph, Mallory, Simon & Gearin*, with an oral argument by *Mr. John M. Gearin*.

For respondent there was a brief over the names of *Gustav Anderson* and *John Manning*, with an oral argument by *Mr. Anderson*, and *Mr. Geo. E. Chamberlain*.

MR. CHIEF JUSTICE BEAN delivered the opinion of the court.

This is an action brought by the administratrix of Frederick J. Miller's estate to recover damages for his death. For some two or three months prior to his death Miller was employed by the defendant as a common laborer in its mill. It was his duty, among other things, to clear away the trimmings and sawdust from a space between one of the saws and the wall, four or five feet distant. Over this space, three feet from the floor, a line shaft two and one half inches in diameter revolved, when the mill was in operation, at the rate of five hundred revolutions a minute. On the end of the shaft, near the wall, and about four feet from the saw, was a large pulley, twenty inches in diameter, over which ran a ten-inch belt. The shaft was in two pieces, joined about six inches from the pulley and three and one half feet from the saw by flange couplings nine inches in diameter, held together by bolts and nuts. These bolts ran parallel to the shaft, and one of them, as the evidence tended to show, extended out on the opposite side from the pulley, about one and one half to one and three quarter inches beyond the nut. Miller's work was in the space between the pulley and the saw, and it was often necessary, in removing the sawdust and trimmings, for him to stoop or reach under the revolving shaft and couplings. On the night of November 21, 1899, while he was thus engaged at work, he was caught, whirled around the shaft, and so injured that he died in a few minutes. No one saw him caught, but two of his fellow workmen, who were some distance away, saw him immediately after, and both testify that he was being whirled around the shaft near the coupling, and a part of the clothing torn from his body was wrapped around the coupling. The mill was usually stopped a few moments while changing crews in the morning and evening, and again at midnight for lunch, but there is no evidence that Miller's attention had been called to the projecting bolt, which was not visible when the shaft was in motion, or that he had any knowledge of it. The plaintiff had a verdict, and the question before us is whether there was any evidence to warrant it.

1. It is the duty of a master to exercise reasonable care, having regard to the usages, habits, and customs of the business, to provide his servant, with a reasonably safe place in which to work, and reasonably safe instrumentalities and appliances to work with, and to continue the same care to keep them in that condition. For a failure in this regard he is liable to a servant injured thereby who is himself free from contributory negligence. The servant, on the other hand, assumes for himself the ordinary and obvious dangers of the work or business in which he engages, but not the risk arising from the negligence of the master, unless he has or is chargeable with knowledge thereof. He has a right to assume, without inquiry or examination, except where the defects are known or are plainly observable by him, that the master has done his duty: *Bailey, Mast. & Serv.* 150; *Johnston v. Oregon Short Line Ry. Co.* 23 Or. 94 (31 Pac. 283); *Pennsylvania Co. v. Witte*, 15 Ind. App. 583 (43 N. E. 319, 44 N. E. 377); *Mast v. Kern*, 34 Or. 247 (75 Am. St. Rep. 580, 600, note, 54 Pac. 950); *George v. Clark*, 29 C. C. A. 374 (85 Fed. 608); *James B. Clow & Sons v. Boltz*, 34 C. C. A. 550 (92 Fed. 572). It needs no argument or authority to show that the defendant was negligent in leaving the bolt in the condition indicated by the evidence. It is contended, however, that it could not reasonably have anticipated that any one would be injured thereby, and that the increased risk occasioned by the projecting bolt was open and visible, and within the knowledge of the servant. But we do not think either of these positions sound. The defendant required its employees to work near, and often under, the revolving shaft and coupling, and must be held to have known that they were liable to accidentally come in contact therewith. It was therefore bound to exercise reasonable care to see that the danger naturally incident to the service was not increased. When it so adjusted its machinery as to leave a bolt needlessly projecting one and one half or one and three quarter inches beyond the coupling on a rapidly revolving shaft at or near a place where its servants were required to work, it manifestly increased the hazard, and rendered their

employment unnecessarily dangerous. That the work might have been done without coming in contact with the belt, or that no one had ever before been injured by it, although it had been in the same condition for several years, is no justification for defendant's negligence, and no defense to this action. The question is not what might or could have been done, but whether the danger to the servant was increased by the projecting bolt.

2. In regard to the other point, there is no evidence that Miller knew of the condition of the bolt, nor was it such an open risk as to charge him with knowledge thereof. It was not visible when the shaft was in motion, owing to the rapidity of its revolutions; and there is no evidence that Miller ever saw the shaft at rest, and, if he did, it was not his duty to look for defects of that kind. He had a right to assume that the machinery was in a reasonably safe condition, and that the danger or hazard incident to his employment had not been increased by the negligent act of the defendant.

3. It is argued that there is no evidence that the projecting bolt was the proximate cause of Miller's death. True, no one saw him come in contact with it, but he was seen a moment later, being whirled around the shaft; and his clothes, which had been torn from his body, were found wrapped around the coupling. This was sufficient to authorize the jury to find that he was caught by the projecting bolt: *Woodman v. Metropolitan R. Co.* 149 Mass. 335 (21 N. E. 482, 4 L. R. A. 213, 14 Am. St. Rep. 427); *Philadelphia & Read. R. Co. v. Huber*, 128 Pa. 63 (18 Atl. 334, 5 L. R. A. 439).

AFFIRMED.

Argued 31 October; decided 25 November, 1901.

40	167
41	498

LADD v. HOLMES.

[66 Pac. 714.]

CONSTITUTIONALITY OF ELECTION LAW—SPECIAL AND LOCAL ACT.

The primary election law of 1901, commonly known as the Lockwood Act (Laws, 1901, p. 317), providing a method of holding primary elections in cities having a population of ten thousand or more, "as shown by the last state or federal census," though applicable to but one city at the time of its enactment, extends to all cities as they subsequently acquire the prescribed population, as the context shows that the act was not intended to apply to only cities that had ten thousand people at the time of the last preceding census, and it is therefore neither special nor local.

ELECTION LAW—REASONABLE CLASSIFICATION.

A classified election law that operates equally upon all within a certain class, as for example, upon all the people within cities over a given size, is based upon a reasonable distinction and is enforceable.

SPECIAL AND LOCAL ELECTION LAW.

The act of 1901, p. 317, providing a method of holding primary elections in cities of a certain class is not a special or local law because it provides for the punishment of offenses arising out of the violation of its provisions, since that is merely an incident to the act.

FREE AND EQUAL ELECTIONS—CONSTITUTIONAL CONSTRUCTION.

The meaning of the word "free" in the Constitution of Oregon, Art. II, § 1, providing that "all elections shall be free and equal," is that the voter shall not be hindered or prevented from free participation in the election; and the word "equal" in the same section means the right of every qualified elector to have his vote counted as cast, and to have the votes of only qualified persons counted, to the end that his vote may exercise its just effect in proportion to the number of votes cast by qualified persons.

IDEM.

The Lockwood Primary Act (Laws, 1901, p. 317), providing a method of holding primary elections for the selection of delegates to nominating conventions, imposes no restraint upon electors, and does not deny to them their proper influence; and hence it is not in conflict with Const. Or. Art. II, § 1, guarantying that elections shall be "free and equal"

ELECTION AUTHORIZED BY LAW—PRIMARY ELECTION.

A law such as Laws, 1901, p. 317, requiring the holding of primary elections for the selection of delegates to nominating conventions under the supervision of public officers at public expense, provides for an election "authorized by law and not provided for by the constitution," within the meaning of Const. Or. Art. II, § 2, prescribing the qualifications of electors in all such elections: *Harris v. Burr*, 32 Or. 348, applied.

RIGHTS OF ELECTORS TO VOTE.

Laws, 1901, p. 317, providing a method of holding primary elections for the selection of delegates to nominating conventions, and limiting the right of the party electors to vote at their respective party primaries, is not in conflict with Const. Or. Art. II, § 2, providing that qualified electors "shall be entitled to vote at all elections authorized by law;" for the right to vote is dependent upon the residence of the elector and the nature of the election.

ELECTION LAW—EQUAL PRIVILEGES AND IMMUNITIES.

An election law such as Laws, 1901, p. 317, providing a method of holding primary elections for the selection of delegates to nominating conventions, denying the benefits of the act to political parties which did not cast at the next preceding election at least a specified per cent. of the total vote, but permitting such minor parties to make nominations in other modes, is not in conflict with Const. Or. Art I, § 20, prohibiting the granting to any citizen or class of citizens of privileges or immunities which upon the same terms shall not equally belong to all citizens, since the act is but a reasonable regulation of the larger parties, designed to safeguard the privileges of the electors thereof, and is not an infringement of the rights of the minor parties.

PRIMARY LAW—RIGHTS OF POLITICAL PARTIES.

An election law such as Laws, 1901, p. 317, requiring the holding of primary elections under the supervision of the general election officers, prescribing a test for the indication of party affiliations, and directing the manner of electing committeemen, fixing their terms of office, and specifying their duties, is not an unwarrantable invasion of the rights of political parties, nor an infringement of the rights guaranteed by Const. Or. Art. I, §§ 26, 33, securing the right of the people to peaceably assemble to consult for their common good, and prohibiting the impairing of the rights and privileges retained by the people, but is merely a regulation of party management, designed to secure to the voters free expression of their will.

PRIMARY LAW—DEPRIVATION OF POLITICAL RIGHT.

An election law directing that no person shall be entitled to vote at a primary election unless he shall have complied with the law relating to registration of electors and shall be entitled to vote at the next ensuing general election (Laws, 1901, pp. 317, 323) does not exclude nonregistered electors; for the registration act (Laws, 1899, p. 128), made operative at a primary election, permits such electors to vote upon prescribed conditions.

PRIMARY ELECTIONS—REGULATING POLITICAL PARTIES.

Laws, 1901, p. 317, providing a method of holding primary elections for the selection of delegates to nominating conventions, is not void for failing to provide for special elections, since such failure relegates the parties in such cases to prior existing methods.

PRIMARY ELECTION LAW—DISCRIMINATION AGAINST DISTRICTS.

Laws, 1901, p. 327, § 24, declares that political parties may provide, as they deem best, for the election of delegates to county conventions from precincts beyond the limits of cities operating under the law. Section 25 directs that the county committee shall be composed of a representative from each precinct in the county, and requires that the committee shall apportion the delegates among the precincts in accordance with the party vote polled at the last preceding election, upon a ratio determined by it. *Held*, that the act does not discriminate against country districts and deprive them of representation in the county conventions, since the delegates thereto must be apportioned in accordance with the party vote polled at the last preceding election by a committee composed of a representative from each precinct of the county.

CONSTITUTIONAL LAW—TITLE OF ACT.

Section 25 of Laws, 1901, p. 327, requiring the appointment of a county managing committee and defining its duties, is germane to and connected with the subject of the act—"to provide for primary elections in cities * * * and providing the manner of conducting the same * * *,"—and hence the law is within the purview of Const. Or. Art. IV, § 20, requiring that every

act shall embrace but one subject and matters properly connected therewith which subject shall be expressed in the title.

PRIMARY ELECTION LAW—APPORTIONMENT OF EXPENSE.

The expenses of primary elections in certain cities, held under Laws, 1901, p. 317, being an incident to a general law, may be imposed upon the counties in which such cities are located.

From Multnomah: MELVIN C. GEORGE, ALFRED F. SEARS, JR., and JOHN B. CLELAND, Judges, sitting in joint session.

This is a suit by Wm. M. Ladd, Fred H. Page, John Bain, and Finlay McKercher, citizens, electors, and taxpayers of Multnomah County, to restrain H. H. Holmes, the county clerk, from attempting to enforce the provisions of two statutes passed by the last legislature (Laws, 1901, pp. 317 and 401), called the Morgan Primary Law and the Lockwood Primary Law, respectively. After a hearing the court sustained the objections to the Morgan act, but upheld the Lockwood act, whereupon the plaintiffs appeal. **AFFIRMED.**

For appellants there was a brief over the names of *Edw. W. Bingham*, and *Wallace McCamant*, with an oral argument by *Mr. McCamant*.

For respondent there was a brief over the names of *Geo. E. Chamberlain*, *Chas. H. Carey*, and *Chas. E. Lockwood*, with an oral argument by *Messrs. Lockwood and Carey*.

MR. JUSTICE WOLVERTON delivered the opinion of the court.

This is a suit to enjoin the Clerk of the County Court of Multnomah County from incurring any pecuniary liability in behalf of the county under the acts passed by the legislative assembly at its last session for the regulation of primary elections within the City of Portland, known as the Morgan and Lockwood acts; the evident purpose being to test the constitutionality of both acts. The circuit court declared the Morgan act invalid, but sustained the other, and the plaintiffs appeal.

The defendant not having appealed, there are left for our consideration the questions presented as they have relation to

the Lockwood act only. The plaintiffs are all taxpayers of Multnomah County, and reside within the City of Portland, except Bain, who lives outside of the city limits. McKercher belongs to the Prohibition party, which polled less than three per cent. of the entire vote cast in the county at the last general election, while Bain has no party affiliations. Thus are brought into the record all classes of individuals affected by the act in question, as it respects their personal rights and privileges under the constitution. The act provides, *inter alia*, that "elections hereafter held in any incorporated city of the state containing a population of ten thousand or more, as shown by the last state or federal census, by any voluntary political association or party, for the purpose of selecting delegates to any convention to nominate candidates for public office, shall be held under the provisions of this act, and such elections shall be styled primary elections": Laws, 1901, p. 317. But it is not to be construed to affect direct nominations without conventions, or nominations by assemblages of electors, as may otherwise be provided for by law. It is made the duty of the county clerk to designate a day, not less than sixty days before any general election, to be known as "Primary Day." Any and all political parties or associations which at the election next preceding polled a sufficient percentage of the entire vote in the state, county, city, precinct, or other electoral district for which nominations are to be made by the convention, to be entitled to make nominations as a political party or association under the laws of the state governing general elections, shall be entitled to vote at such primary election for delegates to their respective party conventions. No nomination made by any convention of delegates shall be deemed lawfully made, or be printed upon the sample or official ballot for use in any general or municipal election, unless such delegates were selected by a primary election held in accordance with this act. Not less than seven days before the time designated for holding the elections the managing committee of the political party desiring to hold a convention of delegates shall cause notice to be given, designating the number of delegates

to be selected, and the apportionment thereof to each election precinct. Provision is made for the nomination of delegates, and for having them certified by the county clerk and placed upon the official ballot, which is the only one that may be used at the polls. The judges and clerks of the general election, as selected by law, are required to serve at the primary election. If an elector is challenged, an oath may be administered, and he may be examined touching his qualifications as an elector at that election, and as a member of the political party or association whose ticket he may desire to vote, and, in determining his residence and qualification, the judges shall be governed by the rules for the conduct of general elections, so far as applicable; but no person is entitled to vote a ticket of any political party unless he resides in the precinct and shall have complied with the requirements of the law relating to the registration of electors, "nor unless, if challenged, he shall swear or affirm that he voted for a majority of the candidates of such party or association at the last election, or intends to do so at the next election": Laws, 1901, p. 323. The names of the electors voting are to be counted, and the number written in each of the poll books and certified by the judges and clerks; and the returns are to be canvassed by the county clerk with the assistance of two justices of the peace, who shall certify and publish the names of the persons having the highest number of votes, and those only shall be entitled to sit in the convention. Parties are entitled to make provision as they deem proper for the election of delegates for outside precincts. One committeeman may be selected by each city or county convention from each election precinct, who shall be the representative of his party in and for such precinct, and the committeemen from all parts of the county shall constitute the county central committee. The term of office is two years from the date of the first meeting, immediately following the election, and, in case of a vacancy occurring, the remaining members may fill it.

To pursue logically the inquiry presented by the record, we have first to consider whether the act is special or local, and

within the inhibition of the state constitution, Art. IV, § 23, subd. 13, as to the passage of any law "providing for opening and conducting the elections of state, county, or township officers, and designating the places of voting," because, if it is, there is no necessity for looking further, as it disposes of the case at once. It is insisted that by the express provisions of the act it was intended to have operation in the City of Portland alone,—that being the only city with a population of ten thousand,—and that it can never extend to or include other cities, should they come to have or possess as great or larger population. If such is the true intendment of the act, the point would be well taken, as it would then be local, or, as the term is defined by Mr. Sutherland, "special as to place": Sutherland, Stat. Const. § 127. "A local act," says Mr. Justice LORD, in *Maxwell v. Tillamook County*, 20 Or. 495, 500 (26 Pac. 803, 804), "applies only to a limited part of the state. It touches but a portion of its territory, a part of its people, or a fraction of the property of its citizens." A law may be general, however, and have but a local application; and it is none the less general and uniform, because it may apply to a designated class, if it operates equally upon all the subjects within the class for which the rule is adopted; and, in determining whether a law is general or special, the court will look to its substance and necessary operation, as well as to its form and phraseology: *People v. Hoffman*, 116 Ill. 587 (5 N. E. 596, 8 N. E. 788, 56 Am. Rep. 793); *Nichols v. Walter*, 37 Minn. 264 (33 N. W. 800). This is the accepted rule everywhere.

Referring to a provision in the Constitution of North Dakota of similar import to the one here invoked, Mr. Chief Justice CORLISS says: "To say that no classification can be made under such an article would make it one of the most pernicious provisions ever made in the fundamental law of the state. It would paralyze the legislative will. It would beget a worse evil than unlimited legislation,—grouping together without homogeneity of the most incongruous objects under the scope of an all-embracing law": *Edmonds v. Herbrandson*, 2 N. D. 270, 273 (50 N. W. 970, 971, 14 L. R. A. 725, 727). The

greater difficulty centers about the classification. It may not be arbitrary, and requires something more than a mere designation by such characteristics as will serve to classify. The mark of distinction must be something of substance, some attendant or inherent peculiarity calling for legislation suggested by natural reason of different character to subserve the rightful demands of governmental needs. So that, when objects and places become the subject of legislative action, and it is sought to include some and exclude others, the inquiry should be whether the distinctive characteristics upon which it is proposed to found different treatment are such as in the nature of things will denote in some reasonable degree a practical and real basis for discrimination: *Sutherland*, Stat. Const. §§ 127, 128; *Nichols v. Walter*, 37 Minn. 264 (33 N. W. 800); *Edmonds v. Herbrandson*, 2 N. D. 270 (14 L. R. A. 725, 727, 50 N. W. 970, 971); *State ex rel. v. Hammer*, 42 N. J. Law, 435; *People ex rel. v. Board of Sup'rs*, 185 Ill. 288 (56 N. E. 1044). Accordingly, it was held that a law general in its scope, framed upon a classification governed by these distinctive principles, is not special or local because there happens to be but one individual of the class, or one place in which it has actual and practical operation: *Van Riper v. Parsons*, 40 N. J. Law, 1; s. c. (second appeal) 40 N. J. Law, 123 (29 Am. Rep. 210). A statute, however, which is plainly intended to affect a particular person or thing, or to become operative in a particular place or locality, and looks to no broader or enlarged application, may be aptly characterized as special and local, and falls within the inhibition. Of such is *State ex rel. v. Mitchell*, 31 Ohio St. 592. There the act complained of was made applicable to "cities of the second class having a population of over thirty-one thousand at the last federal census;" the language quoted being construed as signifying the federal census last taken prior to the passage of the act, which made it operative in the single city of Columbus, and it could never extend to or include other cities, notwithstanding they might advance to a like population. The act was, therefore, although general in terms, purely local in its operation. So, in *State*

ex rel. v. Anderson, 44 Ohio St. 247 (6 N. E. 571),—a case involving an act creating the office of police judge in all cities of the second and third classes, having a population at the last federal census of sixteen thousand five hundred and twelve, and no more,—it was held that the act was special, as it could under no condition apply to any other city than Akron. To the same purpose are *Mott v. Hubbard*, 59 Ohio St. 199 (53 N. E. 47); *Nichols v. Walter*, 37 Minn. 264 (33 N. W. 800); *Edmonds v. Herbrandson*, 2 N. D. 270 (14 L. R. A. 725, 727, 50 N. W. 970, 971); *Devine v. Commissioners*, 84 Ill. 590; *Commonwealth ex rel. v. Patton*, 88 Pa. St. 258. In all these the language of the acts concerned was so restrictive as to confine their operation strictly to definite localities,—so much so, as was said in the last case cited, that the legislature may as well have pointed out the places by naming them, and thus have excluded all others. It may be stated as a positive rule of general application that all acts or parts of acts attempting to create a classification of cities by population which are confined in their operation to a state of facts existing at the date of their adoption or any particular time, or which by any device or subterfuge exclude other cities from ever coming within their purview, or based upon any classification which in relation to the subject concerned is purely illusory, or founded upon unreasonable, obnoxious, or ill-advised distinctions, are ineffectual, as not being founded in substance, are inimical to the constitutional interdiction against special and local legislation, and are therefore null and void: *State ex rel. v. Donovan*, 20 Nev. 75 (15 Pac. 783).

Upon the other hand, many acts have been sustained, and are constantly being upheld, that have local application merely, where they are based upon a reasonable and proper classification: *People v. Hoffman*, 116 Ill. 587 (56 Am. Rep. 793, 5 N. E. 596, 8 N. E. 788), is a case which involved a law containing an exception requiring supervisors in a county containing a soldiers' home to provide a polling place within the inclosure of such home. So in *Hanlon v. Board of Com'rs*, 53 Ind. 123. There the act declared that the county auditor in each county

should receive increased compensation "when the population of the county exceeds fifteen thousand, as shown by the last preceding census, taken by the United States." See, also, *State ex rel. v. Reitz*, 62 Ind. 159, where the act gave the judges of the criminal courts \$2,000 per annum, with a provision "that in all counties having a population of forty thousand, the salary * * * shall be twenty-five hundred dollars;" and, in *City of Indianapolis v. Navin*, 151 Ind. 139 (47 N. E. 525, 51 N. E. 80, 41 L. R. A. 337, 344), where the act was made to apply only to street railroad companies operating in cities of one hundred thousand or more population. A similar case is *Tuttle v. Polk*, 92 Iowa, 433 (60 N. W. 733), and many others may be cited: See *People ex rel. v. Wallace*, 70 Ill. 680; *People ex rel. v. Onahan*, 170 Ill. 449 (48 N. E. 1003); *Wheeler v. City of Philadelphia*, 77 Pa. 338; *Kilgore v. McGee*, 85 Pac. 401; *Seabolt v. Commissioners*, 187 Pa. 318 (41 Atl. 22); *Varney v. Kramer*, 62 N. J. Law, 483 (41 Atl. 711); *Thomason v. Ashworth*, 73 Cal. 73 (14 Pac. 615); *In re Church*, 92 N. Y. 1; *People ex. rel. v. Squire*, 107 N. Y. 593 (14 N. E. 820, 1 Am. St. Rep. 893, and note); *Darrow v. People*, 8 Colo. 417 (8 Pac. 661); *State ex rel. v. Higgins*, 125 Mo. 364 (28 S. W. 638); *Dunne v. Kansas City Ry. Co.* 131 Mo. 1 (32 S. W. 641); *Johnson v. City of Milwaukee*, 88 Wis. 383 (60 N. W. 270); *Boyd v. City of Milwaukee*, 92 Wis. 456 (66 N. W. 603); *Harwood v. Wentworth* (Ariz.), 42 Pac. 1025, s. c. 162 U. S. 547 (16 Sup. Ct. 890); *Holmes Furniture Co. v. Hedges*, 13 Wash. 696 (43 Pac. 944); *State ex rel. v. Stuht*, 52 Neb. 209 (71 N. W. 941).

We come now to an interpretation of the statute, since we have ascertained the rule by which we may distinguish between a general and special or local law. Much has been said relative to the duty of the court to uphold the law, as constitutional, if it is possible to do so without doing violence to common reason and understanding. But we do not conceive the rules of construction in ascertaining the intendment of an act, and thereby determining whether it is within or without the constitution, to be different from those applicable ordinarily,

where its true intendment and purpose are brought to the test for the ascertainment of its operative effect, for where the one is determined the other is resolved also. There is this, however, to be borne in mind: That, by reason of the legislature having adopted the act, there goes with it a presumption that it is within the pale of the fundamental law, otherwise it would not have met with the approval of that body; and in every case where there exists, when proper tests have been brought to bear, a rational doubt upon the subject, it should be resolved in favor of its validity. Courts are never called upon to adopt a strained or unnatural construction for the specific purpose of upholding a law, and, when they have ascertained by fair and reasonable intendment that it is inimical to some fundamental provision, they will not hesitate to so declare. This is a solemn duty enjoined upon them by the settled law of the land, as well as by the oath which individual judges take to support the constitution, under which they derive their powers primarily. The act is to have operation in any incorporated city containing a population of ten thousand or more, "as shown by the last state or federal census." Portland, at the time of its passage, was the only city falling within the classification. This fact, as we have seen, does not derogate from the validity thereof. But does the language employed limit the operation of the act to that city alone, to the exclusion of other cities within the state that may subsequently acquire the prescribed population? If it does not, the next inquiry will be whether the classification is one founded upon some real and substantial, not fanciful, distinction, suggested and prompted by reason and experience. Some cases have been alluded to wherein the population forming the basis of classification was referable to the last census, state or federal, naming but one, and the acts embodying the idea were all held to be invalid. By the present act both the state and federal census are named in the alternative. It is a matter of judicial cognizance that the federal census is taken at the close of a decade, while the state census is taken five years thereafter: (Const. Art. IV. § 5; Hill's Ann. Laws, § 2233); thus affording a census enu-

meration every five years,—the last federal census having been taken in 1900, and that of the state in 1895. Now, it is reasonable to suppose that the legislature had this state of the law in mind when it adopted the act, and that it used the words “last state or federal census,” not for the purpose of adopting the census of 1900 as an inflexible standard, but rather that the census, as taken from time to time, whether state or federal, should constitute the basis by which the classification should be governed. If the intention had been otherwise, the most natural expression would have been the “last federal census,” which would have meant unmistakably the federal census of 1900, and the validity of the act would have been tested thereby to its destruction. The expression employed does not convey that idea at all, but was intended to signify, no doubt, the last preceding census, whether state or federal, so that in any period of five years other cities advancing to the designated standard will fall within the class, and be subject to the operation of the act. The identical language is used in the primary act of 1891, and its validity has never been questioned upon the ground that it was special or local, and the construction that we have given to the act in controversy has been adopted in actual practice and usage. Now, as to the other point, experience has shown that rules and regulations of more specific and stricter character are needful for properly controlling and governing elections in larger and more densely populated cities and towns than in the smaller ones, and in rural districts; so that a classification with respect to elections founded upon population is but a reasonable method of regulation, and the basis adopted affords an appropriate and legitimate distinctive characteristic for the purpose. We conclude, therefore, that the act in question is general, and not in contravention of the state constitution, Art. IV, § 23, subd. 13. This disposes of the other contention, also,—that the act is special and local, as providing for the punishment of crimes and misdemeanors. The offenses alluded to are creatures of and inci-

dent to the act, and, it being general, the punishment was properly provided for.

This contention being resolved favorably to the validity of the act, we are next brought to the consideration of its appropriate relation to a group of constitutional provisions, as to each of which it is strenuously urged that it stands in positive contravention. These are Article I, § 20, and Article II, §§ 1, 2. Article II, § 1, provides that all elections shall be free and equal. To be free means that the voter shall be left in the untrammelled exercise, whether by civil or military authority, of his right or privilege; that is to say, no impediment or restraint of any character shall be imposed upon him, either directly or indirectly, whereby he shall be hindered or prevented from participation at the polls: *De Walt v. Bartley*, 146 Pa. St. 529 (24 Atl. 185, 15 L. R. A. 771, 28 Am. St. Rep. 814; *People v. Hoffman*, 116 Ill. 587 (56 Am. Rep. 793, 5 N. E. 596, 8 N. E. 788). The word "equal" has a different signification. Every elector has the right to have his vote count for all it is worth, in proportion to the whole number of qualified electors desiring to exercise their privilege. Now, if persons not legitimately entitled to vote are permitted to do so, the legal voter is denied his adequate, proportionate share of influence, and the result is that the election, as to him, is unequal; that is, he is denied the equal influence to which he is entitled with all other qualified electors: "Ballot Reform, Its Constitutionality" (John H. Wigmore), 23 Am. Law. Rev. 719; *Edmonds v. Banbury*, 28 Iowa, 267, 271 (4 Am. Rep. 177); *Davis v. School Dist.* 44 N. H. 398, 404; *Commonwealth v. McClelland*, 83 Ky. 686. So that the terms "free" and "equal," used as they are, correlatively, signify that the elections shall not only be open and untrammelled to all persons endowed with the elective franchise, but shall be closed to all not in the enjoyment of such privilege under the constitution.

Does the election provided for by the act in controversy come within the purview of section 2, Art. II of the constitution, which provides that, "in all elections not otherwise provided for by this constitution, every white male citizen of the

United States, of the age of twenty-one years and upwards, who shall have resided in the state during the six months immediately preceding such election, and every white male of foreign birth of the age of twenty-one years and upwards, who shall have resided in this state during the six months immediately preceding such election, shall have declared his intention to become a citizen of the United States one year preceding such election, conformably to the laws of the United States on the subject of naturalization, shall be entitled to vote at all elections authorized by law''? We believe that it does. We had occasion to construe this clause in *Harris v. Burr*, 32 Or. 348 (52 Pac. 17, 39 L. R. A. 768). Its significance, as then ascertained, is that the individuals therein designated are entitled to vote at all elections authorized by law, not otherwise provided for by the constitution. School elections are controlled by the constitutional provision whereby the legislative assembly is required to provide by law for the establishment of a uniform and general system of common schools. Therefore it was held that such elections were otherwise provided for by the constitution, and that a law extending to women the privilege of voting at school elections was not inimical to section 2, Art. II. It seems to us hardly a matter of serious controversy that the elections presently provided for are such as are authorized by law. They are, in practical effect, required to be held by all parties polling a three per cent. vote, as no convention nomination can be legally made unless the delegates attending such convention from the precincts included within a city falling within the class prescribed are selected at such primary election. The judges of election appointed under the general law are authorized and required to preside at the primary election, and to count and certify the vote; and the county clerk, a public functionary, is, with the assistance of two justices of the peace, required to make abstracts from the returns, and thereupon to publish the result, the delegates receiving the highest number of votes being entitled to sit in the convention, and the election is held at public expense. With all this, there is certainly an election authorized by law,

and such a one as is not elsewhere provided for by the constitution: *Spier v. Baker*, 120 Cal. 370 (52 Pac. 659, 41 L. R. A. 196); *Britton v. Board*, 129 Cal. 337 (61 Pac. 1115, 51 L. R. A. 115). The act is none the less valid because it provides for a party election, or, to speak more precisely, elections had at party primaries. All electors of parties authorized or required to hold such elections are entitled to vote at their respective party primaries, and not elsewhere. It is not true that every citizen accorded the elective franchise under the constitution is entitled to vote at all elections. A citizen of one county is not entitled to vote at an election held in another county for local officers, and a citizen of one precinct is not entitled to vote in another, nor of one city or town in another; so that the right of all electors to vote does not extend to all elections authorized by law, but is dependent largely upon the place of residence, and the nature of the election to be held. So it is where party primary elections are held, such as are authorized and required by law, and under the supervision and inspection of public functionaries; it is not a violation of the constitution that all electors are not permitted to vote at a particular party election. Electors of one party have no desire, unless prompted by sinister or evil motives, nor have they any inherent right, within or without the constitution, to vote at some other party primary or election; hence no right or privilege of which they can complain has been intrenched upon or violated. We see no objection to the legislature providing for party elections, and limiting the electoral privilege to party members. The exclusion of other party members from participating in such elections is not an infringement or denial of a constitutional right or privilege.

The state constitution, Art. I, § 20, provides that "no law shall be passed granting to any citizen or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." Mr. McKercher complains (he being a Prohibitionist, and a member of a party casting less than three per cent. of the vote at the preceding general election) that there is an unjust and unwarranted discrimination

against his party as a class, as no provision is made in the act whereby his party may hold primary elections for the purpose of selecting representatives to a convention of delegates, and hence that he and his party are denied a privilege granted to parties casting more than three per cent. of the vote. The requirements of the act, however, do not amount to more than a regulation suited to the larger number of adherents entitled to participate, for the better safeguarding and preservation of the privileges of electors. Under the Australian Ballot Law, only such parties as have cast a three per cent. vote are entitled to have the names of their candidates printed upon the official ballot through the instrumentality of a convention of delegates. Parties of a smaller membership can only secure a place upon such ballot by means of an assembly of electors or a certificate of nomination by individual electors; and this is held to be a regulation merely, and not an infringement of any constitutional right of the minor or smaller parties, or the members thereof. Such a provision was brought to the test in Pennsylvania in *De Walt v. Bartley*, 146 Pa. 529 (24 Atl. 185, 15 L. R. A. 771, 28 Am. St. Rep. 814), where the insistence was the same as here, respecting which Mr. Chief Justice PAXSON says: "The contention is plausible, but unsound. The act does not deny any voter the exercise of the elective franchise because he happens to be a member of a party which at the last general election polled less than three per cent. of the entire vote cast. The provision referred to is but a regulation, and we think a reasonable one, in regard to the printing of tickets." So, in Wisconsin, where, as in Pennsylvania, the Australian Ballot Law was challenged upon the distinctive ground that it was an unwarrantable discrimination between different classes of voters, it was held, in effect, that a reasonable qualification for party representation upon the official ballot was not a constitutional discrimination between such classes: *State v. Anderson*, 100 Wis. 523 (76 N. W. 482, 42 L. R. A. 239). To the same purpose is *State v. Poston*, 58 Ohio St. 620 (51 N. E. 150, 42 L. R. A. 237), and *Ransom v. Black*, 54 N. J. Law, 446 (24 Atl. 489, 1021, 16 L. R. A. 769). The

privilege of holding primaries under regulations prescribed by law, if it can be denominated a privilege, is but a means employed for the designation or certification of delegates whose business it becomes to name candidates for public office; the ultimate purpose being to afford party representation upon the official ballot. The minor parties are afforded ample opportunity for obtaining a like representation thereon, and, while a different mode of procedure is pointed out for the accomplishment of the purpose, there is no denial or infringement upon the ultimate right or privilege of voting for the candidate of their choice with equal ease and facility. The difference in the mode of obtaining representation upon the official ballot is reasonably suited to the proper direction, supervision, and control of the greater parties at their primaries, with a view of securing a free and equal ballot; and the system was so designed, and cannot be considered else than a regulation looking to that end. There is no discrimination against the minor parties, except in the mode of certifying their nominations, as they may yet hold primaries and conventions, and this is justified by the substantial difference in party conditions. The analogy between this and the Australian Ballot Law in respect to obtaining a place upon the official ballot is apparent and complete.

Another contention strongly pressed is that the system of primary elections provided for by the act unwarrantably interferes with the party management of political concerns. It is not claimed that any positive constitutional provision is intrenched upon, except as sections 26 and 33 of Article I of the Bill of Rights may affect the matter incidentally. It is said in the brief that, "independent of any expression in the fundamental law of the state, there are certain political rights, incidental to those guaranteed by the constitution, which cannot be abridged by the legislature." In elaboration of that idea, as applicable generally, we quote from the language of Mr. Justice CHASE in *Calder v. Bull*, 3 Dall. 386,—a case cited by counsel. He says: "There are certain vital principles in our free republican governments which will determine and over-

rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law, or to take away that security for personal liberty or private property for the protection whereof the government was established. An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority. * * * It is against all reason and justice for a people to intrust a legislature with such powers, and therefore it cannot be presumed that they have done it": *Citizens' Saving Assoc. v. Topeka*, 87 U. S. (20 Wall.) 655, 662, is to the same purpose. The Bill of Rights declares (Article I, § 33) that the enumeration of rights and privileges therein contained shall not be construed to impair or deny others retained by the people. The rights insisted upon here, it is thought, are among those retained or reserved. By section 26, Art. I, there can be no restraint of any of the inhabitants of the state from assembling together in a peaceable manner to consult for their common good. Based upon these principles, the plaintiffs assert that they and all other citizens of Oregon are vested with certain political rights that are invaded by the act, among which are the right of association with others for political purposes, and the right to protect their organizations from invasion and control by those whose purposes in politics are adverse. This leads to an inquiry touching those political rights, and to what extent they may be regulated and restricted by legislative action.

In the United States the history of parties begins with the constitutional convention of 1787. It extends throughout all the ramifications and complexities of the national and state governments, and continues to the present time. Parties are important factors in propagating, maintaining, and promulgating governmental policy; and it is largely through their operation and influence that the destiny of the country is moulded and established, and it may be that they are absolutely essential to the maintenance of a representative form of government. Before the constitution it was the custom in Massachusetts, and some other colonies, perhaps, for a coterie of lead-

ing citizens to put forward candidates for office, and these were generally accepted without question. . Clubs sprang up in some localities, especially in New York, and became the organs of groups and parties, and brought out candidates, while in New England the clergy participated in leadership. "Presently," it is said, "as the democratic spirit grew, and people would no longer acquiesce in self-appointed chiefs, the legislatures began to be recognized as the bodies to make nominations for the higher federal and state offices. Each party in congress nominated the candidate to be run for the presidency, each party in a state legislature the candidate for governor, and often for other places also."

This lasted through the early decades of the nineteenth century, but as party struggles became more intense a closer and more comprehensive organization was established, which satisfied the claims of the party leaders, concentrated the efforts of individuals, and knit them together for a common purpose, while it expressed absolute equality of all voters, and the right of each to participate in the selection of candidates and the adoption of party platforms. This new party *regime* grew and ripened, as it respects the Democratic party, about the year 1835, and, as to the Whigs, some years later; and, when the Republican party sprang up, it adopted the system in all of its essential features. The true theory of popular sovereignty requires that the ruling majority must name its own standard bearers or candidates, must define its policy, and in every way express its own mind and will; and the system thus developed and matured is in accord with that theory. It is strictly representative throughout; is not a mere contrivance of party intrigue, or for preventing dissensions, but an essential feature of matured democracy: 2 Bryce, Am. Com. c. 59 (entitled "Party Organizations"), p. 44. It will be seen, therefore, that the system in vogue has developed under the constitutions, federal and state, although not a matter of special concern at the time of their adoption. The parties or organs of the system are voluntary associations, pure and simple, while the functions they perform relate in the main to public

concerns. The primary is the initial step in the system looking to the nomination of candidates whose names are to find a place upon the official ballot, and through its agencies to be submitted to the qualified electors for an expression of their choice. At the top the constitution expressly declares there shall be a free and untrammelled ballot, but its spirit pervades the whole, and reaches back to the inception of the choice of a candidate; so that every elector must be as free to express his own choice of a candidate as to denote his choice of a public officer at the polls. If it were not so, of what avail would be the ballot in the hands of the people? Once the stream is polluted at its source, access to its waters, however free, will not serve to purify it. So it is if the people or party members are deprived of their free choice of candidates, their sacred privilege of exercising an elective franchise is stripped of its virtue. Mr. Bryce, in speaking of party management and the agencies employed, including the primary, in securing nominations and promoting their selection by the people, says: "These details have more significance and make more difference to the working of the government than many of the provisions of the constitution itself": 2 Bryce, Am. Com. c. 60 (entitled "Party Organizations"), p. 57. It would seem, from these observations and conditions, that party management is of such vital importance to the public and the state as that its operation, in so far as it respects the naming of candidates for public office, is an object of special legislative concern, to see that the purposes of the constitution are not perverted, and the people shorn of a free choice.

No attempt is made to specify all the particulars in which the act in question invades the right of party management, but there are three which have become prominent in the discussion. These are the appointment of judges and clerks of the election by the county court, the test prescribed for indicating party affiliation, and the manner pointed out for the election of committeemen, fixing their terms of office, and specifying their duties. It is admitted that the legislature has power to require parties to keep a registry of voters in precincts, adopt

rules and regulations for purging from the lists the names of persons as they die, move out of the precinct, or change their politics, and to provide for a secret ballot at their primaries. The primary act of 1891 requires parties to give notice of the time of holding primaries in cities of two thousand five hundred or more of population, and prescribes the manner of giving it; designates the number of judges to be appointed, fixes their qualifications, and requires them, together with the clerks to be named, to perform their functions under the sanction of an oath; and directs that their returns shall be made to the county clerk, as well as to the political organizations under whose authority such primary elections are held. These are regulations, also, which are virtually conceded to have been authoritatively made by the legislature. There is here some regulation of the acts of political parties, looking to the nomination of candidates for public office; and how much further the lawmaking power may be permitted to go, or where it shall stop, is not pointed out. But it seems to us that if the power is appropriate to requiring an oath of judges and clerks, such as is prescribed for the judges and clerks at general elections, it is also adequate to the naming of these officers through the instrumentality of the civil authorities. It is urged that partisan boards should preside over partisan primaries; and it might be better that they should, but that is a matter of policy, and not of power. So, too, with the manner in which committeemen shall be selected, the designation of their duties, and their term of office. If a managing committee may be required to give notice in a particular manner touching an anticipated primary election and appoint judges, why may not the legislature go a step further, and provide for the selection of its members, denoting the terms of office, and prescribe their duties? If the power exists in the one case, where is the line to be drawn to mark the boundary? It seems to us that when any supervision of the acts of political parties looking to the selection of candidates to be submitted to the suffrages of the people under the constitution, is conceded to be within the power of the legislature a power commensurate with a super-

vision of the entire scheme of nominations for public office is also conceded. In the case of *People v. Democratic Gen. Com. of Kings County*, 164 N. Y. 335 (58 N. E. 124, 51 L. R. A. 674), it was held that, under a law requiring each political party to have a general committee in each county, the members to hold their office for one year, and to be selected at primary elections in the manner pointed out by law, a member thereof could not be removed by the committee during the term for which he was elected, and, again, that legislative action contrary to and inconsistent with the rules and regulations of parties, and of conventions and committees thereof, will effectually displace and supplant all such rules and regulations, and render them nugatory. Here is positive judicial recognition of legislative authority for the supervision of party affairs, as it concerns nominations for public office, that goes beyond any provision of the Lockwood act.

The test prescribed for participating in a party primary is that the elector "voted for a majority of the candidates of such party or association at the last election, or intends to do so at the next election." The authority of the legislature to prescribe and test whatever is challenged; that being a matter, it is contended, wholly within the discretion of the parties themselves. The California primary act of 1899 was declared inoperative because it prescribed no test whatever, and permitted persons of different party affiliations to vote for party delegates: *Britton v. Board*, 129 Cal. 337 (61 Pac. 1115, 51 L. R. A. 115). Hence it would seem that a test is necessary. But who shall prescribe it? Neither the legislature nor the parties can prescribe any test, it is plain, that will operate to exclude legal voters of the same political faith, nor admit any that are not legally qualified, as otherwise the election would not be free and equal. The election being authorized by law, parties cannot claim any higher authority touching the qualifications of voters thereat than the legislature. If so, they might easily subvert the will of the legislature, and render the law nugatory for any substantial purpose. So the question recurs as to whether this feature is one of regulation, also. We think it is,

and within the power of the legislature to prescribe the rules relative thereto under the constitution. The fundamental principle upon which such legislative authority proceeds, and must proceed, is that its ultimate purpose is the election of public officers by a free and equal choice of the qualified electors. A free and equal choice of such officers includes a free and equal choice by party members of the delegates whose function it becomes to select partisan candidates, and the legislative authority is adequate to prescribe all reasonable rules and regulations looking to the security and safeguarding of these sacred rights and privileges. In so doing, the right of the adherents of the respective parties to assemble and consult together for their common good is in no way impinged upon, and they may still advocate and promulgate political doctrines and principles without restriction, so that it is done in a peaceable manner, and does not tend to moral obliquity, the infraction of the law (*Davis v. Beason*, 133 U. S. 333, 10 Sup. Ct. 299), or the destruction of the government itself. In so far as *Britton v. Board*, 129 Cal. 337 (61 Pac. 1115, 51 L. R. A. 115), is not in harmony with this view, if it may be so considered, we cannot approve it.

These observations are applicable to other features of the law to which objections are made. Is the test a reasonable regulation by which to ascertain party affiliation? Mr. Bryce says the usual test adopted by parties is "Did the claimant vote the party ticket at the last important election,—generally the presidential election, or that for the state governorship"? 2 Bryce, Am. Com. c. 60, p. 55. The Wisconsin acts of 1895 and 1897 prescribe, in effect, that precise test: Sess. Laws Wis. 1895, p. 567; Id. 1897, p. 699. The California act of 1897 provides that if a person challenged make oath that it was his *bona fide* present intention to support the nominees of the convention to which delegates are to be elected for such political party or organization, he should be entitled to vote: Stat. Cal. 1897, p. 124. The act was declared unconstitutional, but not upon that ground: *Spier v. Baker*, 120 Cal. 370 (52 Pac. 659, 41 L. R. A. 169). And the legislature evi-

dently so understood it, as at its session of 1901 it passed another act containing precisely the same test to be applied at a party primary election: Stat. Cal. 1901, p. 615. By the New York act, the elector must declare that he is in general sympathy with the principles of the party at whose primary he desires to vote; that it is his intention to support generally at the next general election, state or national, the nominees of such party for state or national offices; and that he has not enrolled with or participated in any primary election or convention of any other party since the first day of the preceding year: Sess. Laws N. Y. 1898, vol. 1, c. 179, p. 334. This is as far as we have been able to find precedent, and we are impressed that the New York provisions are better calculated to serve the purpose for which they are intended than the others; and yet it is concededly impossible to provide any test by which all fraud and illegal voting may be detected and prevented. Much must be left to the legislature to determine, and, so long as it cannot be said that the test adopted is inapt and unreasonable, it ought to be permitted to stand; hence, we are constrained to hold that the present law is valid as it respects that specific objection.

Special attention is directed to section 14, relating to persons entitled to vote at the primary. The language is, "But no person shall be entitled to vote a ticket of any political party or association unless he resides in the precinct where he offers to vote, shall have complied with the requirements of the law relating to registration of electors, and shall be entitled to vote at the next ensuing general election under the provision" of the registration law (Laws, 1901, p. 323). Plaintiffs' counsel claim a significance for that clause which would close the door to all electors who had not secured registration prior to primary day, but, when construed with the preceding section, it is apparent that it was not so intended. That section prescribes the usual oath to be propounded to electors at a general election, which indicates that a person entitled to vote must be a qualified elector at that particular election, not that he would be entitled to vote at the general election following. The evi-

dent purpose was to give operation to the registry act, so far as applicable, so that the voter must either register, or stand challenged at the primary polls, whereupon he shall produce proofs entitling him to vote, as required by section 16 of the registry act (Laws, 1899, p. 128), before he may be allowed to do so.

Objection is made that the law makes no provision for any special election that may become necessary, but this is not vital, as the effect would be to relegate the parties to the law heretofore governing primary elections.

Another invasion of political management complained of is that there is a discrimination against country precincts; it being maintained that, by a reading of the last clause of section 24 in juxtaposition with the last clause of section 25, it becomes manifest that such precincts might be deprived of all representation in the county convention. Such an event, however, could hardly happen when it is considered that the managing committee is to be composed of a representative from each precinct in the county, who are to apportion the delegates in accordance with the party vote polled at the last preceding election.

It is next insisted that section 25 of the act which relates to the appointment of a county managing committee, and its functions and duties, is without the purview of the title of the act. The title is, "To provide for primary elections in cities having a population of more than ten thousand inhabitants, and providing the manner of conducting the same," etc. Now the matter contained in the section alluded to is germane to the subject expressed, being a regulation connected with the holding of primaries, and is therefore within its purview, within the meaning of Article IX, § 20, of the state constitution.

And, again, it is insisted that it was not competent for the legislature to impose the burden of primary elections within the City of Portland upon the whole County of Multnomah, which is made a special cause of complaint by Mr. Bain, who resides and is a taxpayer outside of the city limits. The answer to this, it seems to us, is that the expense is incident to and in

pursuance of a general law of the state, although it operates locally. The election is for the selection of precinct delegates and officers, which is properly a county charge: *Board of Com'rs of Marion County v. Center Tp.* 107 Ind. 584 (8 N. E. 625). This is unlike the case of *Simon v. Northup*, 27 Or. 487 (40 Pac. 560, 30 L. R. A. 171), where the attempt was made to impose a debt of the city upon the county which the county was neither under legal nor moral obligation to pay. Nor is the act one providing for a tax which is required to be equal and uniform, but it simply provides for the adjustment of a public burden which is appropriately incident to the county.

This disposes of all the questions involved, and, being favorable to the respondent, the decree of the court below will be affirmed.

AFFIRMED.

Argued 13 November; decided 9 December, 1901.

WRIGHT v. CRAIG.

[66 Pac. 807.]

40	191
41	288
41	478

FRAUDULENT CONVEYANCE—CONSIDERATION—BURDEN OF PROOF.

1. Where valuable property has been conveyed to relatives for an apparently inadequate consideration by one who is in debt, and by the conveyance is left practically without anything, the burden of proof is upon the parties to the conveyance to show that the consideration was genuine, adequate and valuable: *Marks v. Crow*, 14 Or. 882, and *Mendenhall v. Elwert*, 36 Or. 375, applied.

EVIDENCE OF FRAUD.

2. The testimony in this case seems to preponderate to the effect that the transfer in question was made without an intent by the grantee to defraud creditors.

FRAUDULENT CONVEYANCE—ADEQUACY OF CONSIDERATION.

3. To support a conveyance by an insolvent against the claims of creditors the consideration must be adequate, and unless it is shown to be so the property may be ordered sold subject to the actual consideration proved, which will be a first lien: *Morrell v. Miller*, 28 Or. 354, applied.

From Union: WM. R. ELLIS, Judge.

Suit by W. T. Wright and S. O. Swackhamer against A. C. and Amelia Craig to set aside a conveyance of certain realty by the former to the latter. There was a decree for the defendants, from which plaintiffs appeal.

MODIFIED.

For appellants there was a brief and an oral argument by *Messrs. J. M. Carroll, and Thos H. Crawford.*

For respondents there was a brief over the name of *Baker & Baker*, with an oral argument by *Mr. J. S. Baker.*

MR. JUSTICE WOLVERTON delivered the opinion.

This is a suit to set aside a conveyance of a tract of land having a hotel building thereon, executed by A. C. Craig to his wife, on the alleged ground that it was voluntary, and made and accepted with the intent and for the purpose of defrauding creditors,—especially the plaintiffs herein. At the time of the trial the husband and wife had been living on the premises for twenty-seven years, and there had been expended \$1,500 of the wife's money, left her by a former husband, in the purchase and improvement thereof, the expenditure being made early, as regards the time of their settlement. The record discloses the following facts, which are unquestioned: On November 22, 1888, the plaintiffs and defendant A. C. Craig and others became sureties upon the note of J. B. Eaton, Jr., to the First National Bank of Union. To indemnify them, Eaton gave Swackhamer a mortgage, to foreclose which the bank instituted a suit, and obtained a decree against the makers of the note. The balance remaining due after applying the mortgage proceeds was paid by the solvent sureties, Craig paying nothing thereon. The plaintiffs, Wright and Swackhamer, advanced his (Craig's) proportion to avoid a levy and sale of their property under execution. Within thirty days they filed with the clerk of the court notice of such payment, and claim of contribution and repayment by Craig, and an entry thereof was made in the margin of the docket where the decree was entered. On August 20, 1896, execution was issued to enforce contribution by Craig, and was returned *nulla bona*, except as to \$50, which was realized from the levy and sale of an eighty-acre tract of land. An indorsement on the summons in the suit by the bank shows that Craig accepted service thereof on May 27, 1893, but it may have been later, or some time between that

date and the thirty-first. On the latter date Craig conveyed the property in question to his wife, the deed reciting a consideration of \$1. At the trial in the court below, plaintiffs introduced the records relating to the suit by the bank against Eaton *et al.*, including the execution to enforce contribution, and the accompanying return, together with the deed executed by Craig to his wife. It was further shown that at the time of the conveyance Craig was in possession of the premises, and had been living thereon with his wife for many years; and Mr. Swackhamer testified that he supposed Craig was the owner and solvent at the time the note was executed.

In defense, A. C. Craig testified that \$1 was not the real consideration for the deed, but that it consisted of the payment by his wife, at his request, of two mortgages upon the premises, and a mare which she let him have. The mortgages were payable to George Atkinson and William Wilson, and were for \$1,200 and \$700, respectively; and the mare was turned in at \$200. The mortgages were discharged on the record in 1891,—the latter on January 19, and the former on July 23. On being asked what agreement, if any, he had with his wife with regard to making the deed if she would pay off the mortgages, he replied: “At the time she paid the mortgages off, I told her I would secure her the deed of the place.” The conveyance did not comprise all his property, as he also had the eighty acres sold under execution, as above noted. Craig further stated that the especial occasion for making the deed at the time was that Lindsay Roberts, his wife’s son, was going away, and he wanted him to witness it; that he had no recollection of ever telling his wife of having signed the note; and that since the payment of the mortgages the business, as it respects the property concerned, has been conducted in his wife’s name. Mrs. Craig testified that at the time the deed was executed she knew nothing of her husband signing the note, and that the deed was not accepted for the purpose of defrauding or delaying his creditors; that the consideration paid for the property consisted of money advanced to satisfy two mortgages, and a mare worth

\$200; that Craig agreed to make the deed if she would pay off the mortgages, that she went with him to Baker City, took the money with her, and paid off the Atkinson mortgage of \$1,200 there; that she also paid Atkinson for Wilson \$800 in discharge of the latter's mortgage, being the principal and \$100 interest; that the money so paid was hers, and that no part of it was furnished by Craig; that she earned it by keeping boarders in the hotel situated on the premises, and cooking for railroad and other people; that the house was run in her name; that she managed it and had full charge of it, paid the bills, hired the help, supplied the provisions, etc.; that Craig had not been well for a good many years, and did nothing, comparatively, to help her; that he was there all the time, and helped what he could, but was not able to do much; that he had gone to market some, but that she kept a hired man to do the work and chores. In rebuttal, Robert Eakin testified, in substance, that, as attorney for the plaintiffs, he instituted the suit for the First National Bank against J. B. Eaton, Jr., *et al.*, and, in pursuance of his employment, obtained from A. C. Craig an admission of service of the summons upon him; that he was somewhat surprised, or appeared to be so, that the suit was being brought on the note, or that there was an attempt made to hold him liable, and there was some talk to the effect that he had assurances he would not be held, and also made some statement in purport that a judgment against him would be "no good," anyway; that he either had conveyed his property to his wife, or would convey it to her, and probably some other talk in regard to it, but the particulars he could not recall. Further on he testified as interrogated: "Q. You don't remember positively whether he said he had deeded the property to his wife, or whether he said he would deed it? A. No; I couldn't say which. He may have said he was about to convey it, or that he had already conveyed it. Q. Did he say he was going to do that to protect her? A. Possibly something to that effect. I don't recollect just what language he used in regard to it; but something to the effect that he was getting old

and life was uncertain, and possibly something more about his affairs with his wife. I don't recollect now."

1. It will be noted, in the first instance, that the plaintiffs simply introduced the deed from Craig to his wife, reciting a consideration of \$1, and the records touching the suit by the bank and the subsequent proceedings, whereby it appeared that the deed was made shortly after the acceptance of the service of summons by Craig; and the question of fraud or want of *bona fides* touching the conveyance, and a purpose to hinder and delay the creditors, is left to inference and presumption. The principal part of Craig's property was thus transferred to his wife, leaving an eighty-acre tract of land in his name, which was afterwards sold for \$50; thus rendering him insolvent and without sufficient means with which to discharge his legal obligations. This was quite sufficient, under the circumstances, to shift the burden of proof. It made a *prima facie* case of fraud, and thereafter it devolved upon the wife to show that she took and accepted the conveyance in entire good faith, without purpose of defrauding the creditors of Craig, and for a valuable and adequate consideration. It is not a badge of fraud for a husband to sell and transfer property to his wife; for the husband and wife can now deal with each other, so far as their separate property rights are concerned, as if they were strangers, and where the right exists there can be no impropriety in exercising it. However, by reason of the facility afforded by the relationship of the parties for entering into confidential relations and keeping them secluded from others, such a transaction will be closely scrutinized, and the grantee must exhibit such a case as is wholly consistent with fair dealing. As was held in *Marks v. Crow*, 14 Or. 382 (13 Pac. 55),—an analogous case: "Where one who is in debt at the time conveys substantially the whole of his estate to his brother, ostensibly in satisfaction of his debt to the latter, in a suit by creditors to set aside a deed for fraud it is incumbent upon the grantee to establish by satisfactory proof that there was a valuable and adequate consideration for the deed. And, unless he can give a clear and precise account of

the items constituting the alleged debt, a fraudulent intent will be inferred." The consideration must not only be valuable, but should also be adequate: 14 Am. & Eng. Ency. Law (2 ed.) , 292. And, generally, see *Jolly v. Kyle*, 27 Or. 95 (39 Pac. 999); *Flynn v. Baisley*, 35 Or. 268 (57 Pac. 908, 45 L. R. A. 645, 76 Am. St. Rep. 495); *Mendenhall v. Elwert*, 36 Or. 375 (59 Pac. 805).

2. Mrs. Craig denies any knowledge of her husband's indebtedness at the time of the transfer, or any complicity with him in any design that he may have had to hinder or defraud the plaintiffs in the collection of their demand; and there is nothing tangible in the record to gainsay what she asserts. Both she and her husband testify that the money with which the mortgages were discharged belonged to her, and that he agreed, in consideration of their payment, to make her the deed; and this arrangement between them, or the fact of its existence, is nowhere disputed. The money with which these mortgages were discharged, so far as disclosed by the evidence, was accumulated by Mrs. Craig in carrying on the hotel, or boarding house, as it is sometimes called. This was conducted by her and in her name. She incurred the liabilities and discharged them, and received the profits, and there is no circumstance to militate against her right thereto, except that the property belonged to her husband, and they were living together thereon as husband and wife. She had put her means in the property, however, and he was unable to engage in active employment, and it is quite natural, and not at all improbable, that she should assume charge of the business, and manage and conduct it in her own right; and we must take it as established that she earned the money with which the mortgages were paid. Craig could allow his wife the use of the property, if he saw fit, so long as it was not done with a fraudulent intent; and it is not charged that he purposed thereby to hinder or delay the plaintiffs in the collection of their demand. The charge of fraud is confined exclusively to the transfer. Although accompanied by some suspicious circumstances, and whatever may have been Craig's intention, we

think it appears by a preponderance of the evidence that Mrs. Craig paid off the mortgages, expecting to obtain title to the property, without knowledge of his indebtedness.

3. But there was a very material matter in connection with the transaction that she did not establish, namely, that she paid an adequate consideration for the property. In this the burden was with her. There is not a word in the record as to the value of the property, and yet it is insisted by the plaintiffs that it will readily sell for \$6,000 to \$10,000. If such is the case, there was a grave inadequacy of consideration. It is not claimed by the defendants that the \$1,500 put into the property by Mrs. Craig at the time of the settlement thereon was part of the consideration for the transfer, and it could not be so considered, in any event, because of the great lapse of time, and the absence of any intent shown to keep the credit alive, if it was ever their purpose to do so: *Fleischner v. Bank of McMinnville*, 36 Or. 533, 569 (60 Pac. 603); *Bates v. McConnell* (C. C.), 31 Fed. 588. The consideration advanced by Mrs. Craig was, no doubt, valuable; but she could have gone further and shown, if such was the case, that it was also adequate. In not doing this, the fact of adequacy of the price paid is left unproved; and we must assume that there was a manifest disparity between the real value and the price paid, or she would have established the contrary. It was not incumbent on the plaintiffs to show the disparity, although they might have done so; for when they made a *prima facie* case the burden shifted to the defendants to establish the *bona fides* of the sale, against the claims and demands of creditors, and adequacy of consideration is one of the essential elements of such proof. Now, where there is a manifest disparity in the respect alluded to, a court of equity may adopt such specific relief as may be best suited to the exigencies of the case, and, among others, may declare the sale voluntary as to the excess, and allow it to stand as to that which is valuable and real: *Clements v. Moore*, 73 U. S. (6 Wall.) 299, 312; *Bates v. McConnell*, 31 Fed. 588; *Herschfeldt v. George*, 6 Mich. 456; *Strong v. Lawrence*, 58 Iowa, 55 (12 N. W. 74); *Lyon v. Had-*

dock, 59 Iowa, 682 (13 N. W. 737); *Boyd v. Dunlap*, 1 Johns. Ch. 478. Indeed, the principle has been adopted in this state: *Crawford v. Beard*, 12 Or. 447 (8 Pac. 537); *Morrell v. Miller*, 28 Or. 354 (43 Pac. 490, 45 Pac. 246).

The decree of the court below will therefore be modified, and one here entered setting aside the conveyance from Craig to his wife, and directing that the property be sold to satisfy the plaintiffs demand, subject to the actual consideration paid by Mrs. Craig, with interest at eight per cent. per annum from the date of payment. The amount paid, as shown, was \$800 on the Wilson mortgage, January 19, 1891; \$1,200 on the Atkinson mortgage, July 22; and the value of the mare, \$200. It does not appear when the mare was delivered to Craig, but it must have been prior to any payment upon the mortgages, and interest will be allowed thereon from January 19, 1891. The aggregate of these sums at the rate suggested is \$4,009.37. This sum will be declared a lien upon the premises in favor of Mrs. Craig, superior in right and prior in time to the plaintiffs' demand. Plaintiffs to recover their costs and disbursements in both courts. MODIFIED.

40	198
44	433

Argued 13 November; decided 9 Dec., 1901; rehearing denied 27 Jan., 1902.

GARNIER v. WHEELER.

[66 Pac. 812.]

FRAUDULENT CONVEYANCES—GENERAL RULES.

1. In considering whether conveyances made by debtors are fraudulent, several rules are well established, among which may be mentioned these: the grantee must know of the intent to hinder and defraud and acquiesce therein; the fraud may be inferred from surrounding circumstances; and conveyances between relatives will always be very closely examined.

EVIDENCE OF FRAUDULENT INTENT.

2. The evidence does not show that the grantee in the conveyance in question participated in the fraudulent intent of the grantor, if it be conceded that the latter meant to delay his creditors.

From Washington: THOS. A. McBRIDE, Judge.

Suit by Jean Baptiste Emile Garnier and others against Ira E. Wheeler and others. From a decree for defendants, plaintiffs appeal. AFFIRMED.

For appellants there was a brief over the names of *Emmons & Emmons*, and *Gustavus C. Moser*, with an oral argument by *Messrs. Halmor H. Emmons*, and *John Wesley Bell*.

For respondents there was a brief and an oral argument by *Messrs. Samuel B. Huston*, and *Thos. H. Tongue*.

MR. JUSTICE MOORE delivered the opinion.

This is a suit to set aside a deed as to a part of the real property conveyed thereby, and to subject such part to the payment of a judgment. The admitted facts are that the defendant Ira E. Wheeler executed to B. Phillips, August 19, 1893, three promissory notes, each for the sum of \$200, payable in ninety, one hundred and fifty, and two hundred and ten days, respectively; that Wheeler was then the owner of the property so conveyed, which, on October 5, 1893, for the expressed consideration of \$8,000, he conveyed to his brother, the defendant David R. Wheeler; that said notes were assigned to the plaintiffs, and, no part thereof having been paid, they, on April 13, 1895, secured a judgment in the circuit court for Multnomah County against the maker for the amount due thereon, and on February 25, 1897, executions theretofore issued thereon to the sheriffs of Multnomah and Washington counties were returned *nulla bona*; that David Wheeler conveyed away a part thereof, and now owns only lots Nos. 1, 2, 3, 4, 5, 7, 8, 10, 11, 12, and the west half of lot 9, in Wheeler's Subdivision in Washington County, as appeared by the recorded plat thereof. It is alleged in the complaint that Ira E. Wheeler fraudulently conveyed said land to his brother without consideration, and with intent to hinder, delay, and defraud his creditors; that upon the execution of the deed he became, and still is, insolvent; and that no part of said judgment has ever been paid. The defendant David R. Wheeler, an-

swering the complaint, denied the material allegations thereof, and averred that at the time said deed was executed his brother was indebted to him in the sum of \$2,700; that said premises were subject to the lien of a mortgage to secure the sum of \$1,250 and interest, the payment of which he assumed; that he paid his brother the sum of \$1,500, and executed to him a promissory note for the sum of \$2,000, in consideration of said land, and that he had fully paid said note; that he purchased said premises, and paid full value therefor, without notice or knowledge of plaintiff's claim, and without fraudulent intent of any kind or character whatever. The reply having put in issue the allegations of new matter in the answer, a trial was had, resulting in a decree dismissing the suit, and plaintiffs appeal.

1. The question presented for consideration is as to whether David R. Wheeler was an innocent purchaser for a valuable consideration, without knowledge or notice of any bad intent on the part of his brother. "Three things," says Mr. Wait in his work on *Fraudulent Conveyances* (section 369), "must concur to protect the title of the purchaser: (1) He must buy without notice of the bad intent on the part of the vendor; (2) he must be a purchaser for a valuable consideration; and (3) he must have paid the purchase money before he had notice of the fraud." Every conveyance of any estate or interest in lands made with the intent of hindering, delaying, or defrauding creditors is voidable as to them: *Hill's Ann. Laws*, § 3059; *Bradtfeldt v. Cooke*, 27 Or. 194 (50 Am. St. Rep. 701, 40 Pac. 1). The grantor's intent to defraud his creditors, however, will not defeat the title of a purchaser for a valuable consideration, unless it appears that the latter had previous notice of such intent [*Hill's Ann. Laws*, § 3062; *Lyons v. Leahy*, 15 Or. 8 (13 Pac. 643, 3 Am. St. Rep. 133); *Philbrick v. O'Conner*, 15 Or. 15 (13 Pac. 612, 3 Am. St. Rep. 139)]; the rule being that the deed will not be set aside for fraud unless it appears that the grantee accepted a conveyance with knowledge of the grantor's fraudulent intent, thereby participating in the fraud: *Bonser v. Miller*, 5 Or. 110. The fraudulent

intent is a question of fact (Hill's Ann. Laws, § 3062), which may be established by direct proof, or, in a suit in equity, inferred from the facts and circumstances surrounding the transaction: *Coolidge v. Heneky*, 11 Or. 327 (8 Pac. 281); *Lyons v. Leahy*, 15 Or. 8 (3 Am. St. Rep. 133, 13 Pac. 643); *Philbrick v. O'Connor*, 15 Or. 15 (3 Am. St. Rep. 139, 13 Pac. 612). A conveyance of real property to a relative is always closely scrutinized when the *bona fides* of the transaction is challenged by the grantor's creditors; the presumption in such cases being that the fraudulent intention of the grantor, by reason of the intimacy of the parties, must have been known to, and participated by, the grantee: *Jolly v. Kyle*, 27 Or. 95 (39 Pac. 999); *Feldman v. Nicolai*, 28 Or. 34 (40 Pac. 1010); *Flynn v. Baisley*, 35 Or. 268 (45 L. R. A. 645, 76 Am. St. Rep. 495, 57 Pac. 908).

2. The evidence shows that the defendant Ira E. Wheeler owned lot 3, block 22, in Wheeler's Addition to East Portland, which was attached October 4, 1893, in an action brought against him in the circuit court for Multnomah County by the Gambrinus Brewing Company to recover the sum of \$400, with interest from August 19, 1893. James Hume, who lived in Washington County, near the residence of David R. Wheeler, appearing as plaintiffs' witness, testified that on the day Ira E. Wheeler's property was attached he met the latter in Portland, and was requested by him to tell his brother David R. to meet him in Hillsboro the next day, and accept a transfer of said real property. The witness, being requested to "state what that conversation was," said: "I was in there, and Mr. Wheeler asked me if I was going out, and I said I was going out to-night, and he asked me if I would come down to his brother's, and tell him what to do,—to come up here. Q. What was that? A. To transfer the property over to his brother. Q. Did he tell you why he wanted it transferred? A. Well, he said he wanted to beat them fellows. I don't know what he meant or who he meant. Q. Did he say what fellows? A. No, sir. Q. Did you go out? A. I went out, and came down next morning, and told him what he told me to tell him, and I delivered

my message, and he came up here. * * * Q. What did you tell David? A. What his brother told me. Q. Relate it. A. That his brother wanted him to go up and transfer his property over to him. Q. Up where? A. To come up to Hillsboro. He came up on the train the next morning.” Ira E. Wheeler testified that he had been asking \$10,000 for the land, but David offered him only \$8,000, and that he told Hume to tell his brother he accepted his offer, and would go to Hillsboro next day, and execute a deed to him therefor, but denies having told him that he intended to beat any one. Hume does not testify that he informed David that Ira wanted to beat “them fellows,” or to defraud any of his creditors. He says he informed David as Ira requested him, from which it might be inferred that he told David Ira wanted to convey the property to defraud his creditors. But, when requested to relate the statement which he made to David, he says, in effect, he told him his brother wanted him to go to Hillsboro to take a transfer of the property.

From a careful examination of the testimony, we do not think David had any knowledge or notice of his brother’s intention to defraud his creditors, if such intention existed. At the time Ira’s property in East Portland was attached it was estimated to be worth about \$3,000, though incumbered by a mortgage for the sum of \$500. That property was sold under an execution issued upon the brewing company’s judgment, and was never redeemed. But such failure to secure a restoration of the estate does not necessarily prove that Ira entertained an intent to defraud his creditors at the time he executed the deed to his brother, for he may have thought the East Portland property sufficient to pay the sum due on plaintiff’s notes, which seem to be a part of the series executed by him, to which the Gambrinus Brewing Company note belonged. The financial crisis which occurred about the time of or soon after the property was attached disappointed the expectations of many debtors in respect to the value of their property, and defeated their hopes of its bringing, upon a forced sale, any greater sum than the creditors’ demand. The

state of the money market at that time was such that it was almost impossible to secure a loan upon property, so that its redemption could be effected. We do not think Ira, at the time the conveyance was made to his brother, entertained an intent to defraud his creditors. He owed Hume at that time, and if such intent were cherished it seems unreasonable that he should have informed him that he was going to transfer the land in question to David to defraud any of his creditors; and this fact alone seems to render Hume's statement improbable. But, however this may be, we do not think the testimony shows that David had any knowledge or notice of his brother's fraudulent intent until after he had paid the entire consideration for the land. David had long desired Ira's land as an addition to his farm, and had been negotiating for its purchase, hoping thereby to secure the settlement of Ira's indebtedness to him. It is admitted that the property was not worth more than \$8,000, and that David paid therefor this consideration, which is fully accounted for, except as to about \$700. It is difficult to say with any degree of certainty what sum was due him at the time the deed was executed. David and Ira testified that it was about \$2,700, but they cannot give the detailed items, except as to about \$2,000. David says that at different times he loaned his brother sums varying from \$10 to \$250, and in this he is corroborated by Ira.

Plaintiffs' counsel, in support of their contention that the court erred in dismissing the suit, rely upon the case of *Marks v. Crow*, 14 Or. 382 (13 Pac. 55), where it was held that one who was in debt at the time of conveying substantially the whole of his estate to his brother, ostensibly in satisfaction of his debt to the latter, in a suit by creditors to set aside the deed for fraud it is incumbent upon the grantee to establish by satisfactory proof that there was a valuable and adequate consideration for the deed, and unless he can give a clear and precise account of the items constituting the alleged debt a fraudulent intent will be inferred. But in the case at bar the trial occurred about five and one half years after the deed was executed, and it is not strange that the defendants cannot give a

correct itemized account of the debt due from Ira to David. At that time the brothers possessed quite an amount of property, and had transacted considerable business, and it is not at all strange that they cannot, in a transaction involving \$8,000, account for about \$700, except by saying that it was made up of small loans, which, at the time of the transfer, was estimated to be about that sum. David Wheeler testifies that he kept no books, and relied upon his brother's memoranda of the loans. If, under these circumstances, he had attempted to give a detailed account of every dollar which went to make up the \$700, it might be well considered as a circumstance tending to impeach his veracity, particularly so after such a lapse of time. The witness Hume contradicts himself in many instances, and the trial court having seen him, and noted his manner and bearing on the stand, its opinion is entitled to much weight. But, aside from such opinion, we do not think the evidence sufficient to change the conclusion reached.

It follows that the decree is affirmed.

AFFIRMED.

Argued 14 Nov.; decided 9 Dec., 1901; rehearing denied 27 Jan., 1902.

WATSON v. MOORE.

[66 Pac. 814.]

EXECUTION AGAINST PROPERTY OF DECEDENTS—STATUTES.

Under Section 281 of Hill's Ann. Laws, providing that an execution may issue on a judgment against a deceased debtor, "and may be executed in the same manner and with the same effect as if he were still living, but such execution shall not issue within six months from the granting of letters testamentary or of administration, without leave of the county court," an execution cannot issue against the property of a deceased debtor prior to the appointment of an executor or administrator.

From Columbia: THOS. A. McBRIDE, Judge.

James F. Watson, trustee, and another recovered a judgment against H. B. Borthwick, in 1895. At half past eight o'clock on the morning of the ninth of October, 1899, Borthwick died, and four hours later executions were issued on said judgment and instantly levied on his property. The next day

D. J. Moore was appointed administrator of the estate and petitioned for the recall of the executions. The petition was granted, the executions were recalled and quashed, and the plaintiffs appealed. AFFIRMED.

For appellants there was a brief over the name of *Platt & Platt*, with an oral argument by *Mr. Harrison G. Platt*.

For respondent there was a brief over the name of *Cotton, Teal & Minor*, with an oral argument by *Mr. Joseph N. Teal*.

MR. JUSTICE WOLVERTON delivered the opinion.

The plaintiffs, having an unsatisfied decree against H. B. Borthwick, caused several executions thereon to issue contemporaneously to the sheriffs of different counties subsequent to his death and prior to the appointment of an administrator of his estate, which, being decreed by the court below to have been improvidently issued, were recalled and quashed, and the plaintiffs appeal.

The sole question presented is whether an execution may issue during such period, and depends entirely upon the proper construction or rendition of the statute pertaining to the enforcement of judgments in civil actions. There are three clauses bearing directly upon the matter in hand. The first provides that "the party in whose favor a judgment is given which requires the payment of money, the delivery of real or personal property, or either of them, may at any time after the entry thereof have a writ of execution issued for its enforcement as provided in this title;" the second, that, "if it be issued after the death of the judgment debtor, and be against real or personal property, it shall require the sheriff to satisfy the judgment, with interest, out of any property in the hands of the debtor's personal representatives, heirs, devisees, legatees, tenants of real property, or trustees, as such;" and the last, that, "notwithstanding the death of a party after judgment, execution thereon against his property, or for the delivery of real or personal property, may be issued and executed

in the same manner and with the same effect as if he were still living; but such execution shall not issue within six months from the granting of letters testamentary or of administration upon the estate of such party, without leave of the county court or judge thereof": Hill's Ann. Laws, §§ 274, 276, subd. 2, § 281. All these clauses must be construed in *pari materia* as they are component parts of a general act adopted in the identical form here set out in 1862: Deady's Gen. Laws, 1845-1864, p. 208. Although section 276 has since been amended, it left subdivision 2 in the exact language employed in the original act. Section 274 grants authority generally for the issuance of the writ for the enforcement of the judgment as provided in the title, but it does not attempt to define when, and under what circumstances, it shall issue. Subdivision 2 of section 276, reveals an intendment that it may issue after the death of the judgment debtor; and section 281 expressly so declares, and, further, that it may be executed in the same manner, and with the same effect, as if he were still living. This general authority, however, is qualified by what follows, namely: "But such execution shall not issue within six months from the granting of letters testamentary or of administration * * * without leave of the county court or judge thereof."

At common law execution could not issue except the judgment was revived through the instrumentality of a writ of *scire facias*, which brought in new parties, and gave them their day in court; but the use of such writ has long since been dispensed with [*Bower v. Holladay*, 18 Or. 491 (22 Pac. 553); *Wallace v. Swinton*, 64 N. Y. 188] and the statute gives the only remedy available. Now, section 274 gives the party in whose favor a judgment has been rendered an execution, and the first clause of section 281 provides that it may issue notwithstanding the death of the judgment debtor; but when and how is determined by the latter clause of the section. There is no statutory provision for the issuance of any execution between the time of the decease of the judgment debtor and the granting of letters testamentary or of administration, and hence no such authority exists. The judgment creditor must

abide the appointment of an executor or administrator, and the lapse of six months thereafter before he can have his writ, except by leave of the county court or judge thereof, which can be granted only after the appointment; and such is the plain meaning of the statute,—“such execution shall not issue within six months from the granting of letters.” This is a qualification of the general statutory right to have execution, and marks the limit as it respects the time within which it may issue in case of the death of the judgment debtor; so it clearly appears that plaintiffs’ executions were improvidently issued.

The question as to how the writ should be executed when issued is not a matter of present concern, as it is not presented by the record, and what we might say respecting it would be *obliter*.

There will be an affirmance of the decree. **AFFIRMED.**

Argued 12 November; decided 2 December, 1901; rehearing denied.

BAKER COUNTY v. BENSON.

[66 Pac. 815.]

PUBLIC OFFICERS—RIGHT TO FEES.

1. The right of a public officer to compensation must be based on a constitutional or statutory provision, and he can demand only those fees there prescribed: *Houser v. Umatilla County*, 30 Or. 486, cited.

PUBLIC OFFICERS—CHARGES AGAINST STATE OR COUNTY.

2. Public corporations, being instrumentalities of government, are not impliedly under obligation to pay public officers for services rendered to them, there must always be a legal provision for every charge for such services.

COUNTY CLERK—STATUTES.

3. Under a statute providing a salary for a county clerk, to be exclusive of all other charges and compensation, except for furnishing copies to private parties, a county is a private party as to the clerk of another county, and the clerk may properly charge the other county for copies of his records.

PUBLIC OFFICERS—SERVICES TO PUBLIC CORPORATIONS.

4. A public officer is not entitled to demand in advance his legal charges for making copies of records for a county.

CONSTITUTION—STATUTES.

5. Under the Constitution of Oregon, Art. I, § 18, providing that no man’s particular services shall be demanded without just compensation being first assessed and tendered, “except in the case of the state,” a public officer who is required to perform certain duties for a public corporation and is entitled to collect fees therefor, cannot insist on having his money before doing the work, since the public corporation is a part of the state, and therefore within the excepting clause.

ANNEXATION OF COUNTIES—APPORTIONING DEBT.

6. It is not an objection to an act annexing part of one county to another county that the former has a right to the taxes for the current year to use for its current expenses and debt, of which it cannot be deprived by an arbitrary legislative act, where the act provides that the county to which the land is annexed shall pay a stated just proportion of the indebtedness of the county from which the land is taken.

CONSTITUTIONAL LAW—COLLATERAL PROCEEDING.

7. It is a general rule that in a collateral proceeding the constitutionality of a statute will not be considered; thus in a mandamus proceeding by Baker County to compel the clerk of Union County to make and deliver to it certain transcripts as required by a legislative act annexing part of Union County to Baker County, the court will assume that the act is valid: *Stevens v. Carter*, 27 Or. 553, followed.

DESCRIPTIONS—COURSES—MONUMENTS.

8. It is a general rule that monuments control courses and distances in construing descriptions of land, but this must yield to the superior rule that the entire instrument must be considered with its surrounding circumstances and upheld if reasonably possible. For example, a legislative act (Laws, 1901, p. 435), annexing part of one county to another, described the boundary line of the annexed portion, in part, as running east along a certain township line to the W. county line; thence easterly along the W. county line to a river. The W. county line referred to ran in an easterly direction along the summit of certain mountains to a particular point, and thence due east to the river referred to; and the township line, when extended as described, did not intersect, but ran south of, the summit of the mountains. It was held that the court would assume that the legislature intended the line to be extended east to the river, unless it intersected the county line, in which event it was to follow the county line, and that by thus disregarding the county line the description was sufficiently certain, and the act valid.

LOCAL AND SPECIAL LAW.

9. An act annexing a part of one county to another county, such as (Laws 1901, p. 435), adding to Baker County a part of Union County, is both local and special, within the meaning of the State Constitution, Art. I, § 21, stating the conditions on which certain "local and special laws" may take effect.

CONSTRUCTION OF CONSTITUTION—SUBMISSION TO POPULAR VOTE.

10. The expression in the State Constitution, Art. I, § 21, that no law shall be passed, the taking effect of which shall be made to depend on any authority, except as provided by the constitution. "provided local and special laws may take effect or not, upon a vote of the electors interested," is neither a grant nor a limitation of power, but merely a qualification on the preceding clause, and does not make it obligatory on the legislature to submit to the interested electors the question whether certain territory in one county should be separated therefrom and annexed to another, and a special act providing for such annexation is not unconstitutional because it is conditioned on popular approval through the ballot.

CONSTITUTIONALITY OF CHANGE IN SENATORIAL DISTRICTS.

11. An act annexing part of a county in one senatorial district to another county in the different district is not unconstitutional as violating the State Constitution, Art. IV, §§ 3, 5, 6 and 7, regulating the apportionment of senators among the several counties.

From Union: WM. R. ELLIS, Judge.

Mandamus by Baker County, a municipal corporation, against George W. Benson, county clerk, and *ex officio* clerk of the circuit court of Union County, to compel the defendant to make out and deliver certain transcripts to the clerk of Baker County, and also to deliver certain original papers on file in his office. From a judgment awarding a peremptory writ, defendant appeals.

AFFIRMED.

For appellant there was a brief and an oral argument by *Messrs. Thos. H. Crawford, J. M. Carroll, and C. E. Cochran.*

For respondent there was a brief and an oral argument by *Messrs. Samuel White, district attorney, Chas. A. Johns, and A. B. Winfree.*

MR. JUSTICE MOORE delivered the opinion.

This is a mandamus proceeding to compel the defendant, as county clerk and *ex officio* clerk of the circuit court for Union County, to perform an act which it is alleged the law specially enjoins upon him as a duty resulting from his office. The facts are that by an act of the legislative assembly which took effect March 1, 1901, purporting to annex a part of Union County to the County of Baker, the clerk of Union County was required, within thirty days after said act should become operative, to make out and deliver to the clerk of Baker County certain transcripts, and also to deliver certain original papers on file in his office: Laws, 1901, p. 435. An alternative writ, averring that the defendant refused and still refuses to discharge the duty so enjoined upon him, having been issued, commanding him to perform the same, or show cause why he had not done so, for return thereto he denied the material averments contained therein, and alleged, in effect, the following separate defenses: (1) That he is entitled to ten cents per folio for making transcripts of the records and files of his office; that, having been requested to comply with the provis-

ions of said act, he demanded that the plaintiff pay or agree to pay him, upon delivery of said transcripts, his legal fees therefor; that the plaintiff refused to pay or to agree to pay such fees, or any part thereof, whereupon he refused and still refuses to make said transcripts, or to deliver the same or the original papers to plaintiff. (2) That the territory attempted to be so annexed includes taxable property of the value of about \$450,000; that the taxes levied thereon by Union County for the year 1901 amounted to about \$12,000, and the delinquent taxes due thereon about \$1,100, which constitute a part of the fund out of which Union County must pay its current expenses and pro rata share of the state taxes for the present year; and that it has a vested right to said tax, of which it cannot be deprived by the legislative assembly. (3) That by an act of the legislative assembly approved February 27, 1901 (Laws, 1901, p. 175), the state taxes for the succeeding five years were apportioned among the several counties of the state, based upon their average assessment for the five preceding years, and in the assessment of Union County for that period was included the valuation of the property attempted to be annexed to Baker County; that the rate of taxation so demanded from Union County for state purposes is .0262, while that required of Baker County is only .0195; that in the attempt to annex said territory no provision was made for reimbursing Union County for any part of said taxes to be paid by it for the five years ensuing on account of the taxable property in said territory, thereby imposing upon said county an unequal rate of assessment and taxation, which, if upheld, would compel it annually to pay about \$3,000 more than its pro rata share of the state tax; and that the defendant is a taxpayer in said county, and as such has a beneficial interest in the rate of taxation imposed upon it. (4) That some of the calls describing the boundary of said territory attempted to be attached to Baker County do not meet or intersect, thereby rendering the description void for uncertainty. (5) That the act attempting to change the boundaries of Union County is local and special, and, not having been submitted to the electors residing

in the territory attempted to be annexed, to take effect or not upon their vote, the act contravenes Article I, § 21, of the Constitution of Oregon, and is therefore void. (6) That by the act of the legislative assembly filed in the office of the Secretary of State February 7, 1899 (Laws, 1899, p. 7), a regular decennial apportionment bill was passed, repealing all prior acts in relation thereto, whereby the counties of Morrow, Umatilla, and Union were constituted the Twenty-Second, Union and Walla-walla the Twenty-Fourth, and Baker, Harney, and Malheur the Twenty-Fifth, senatorial district, each district being entitled to one senator; that, at the time the enumeration was made upon which said apportionment was based, the territory so attempted to be annexed to Baker County contained between three thousand and four thousand inhabitants, and the attempt of the legislative assembly, within the period of ten years from said apportionment, to change the boundaries of the Twenty-Second and of the Twenty-Fourth senatorial districts, and transfer said inhabitants to the Twenty-Fifth, contravenes sections 3, 5, 6, and 7 of Article IV of the state constitution. A demurrer to each of said defenses on the ground that it did not state facts sufficient to constitute a defense having been sustained, the defendant declined further to plead or answer, whereupon the court awarded a peremptory mandamus, from which judgment he appeals.

Examining the separate defenses in the order in which they are alleged, the first question to be considered is whether the defendant, as clerk of Union County, can be compelled to deliver the transcripts required without being paid therefor by Baker County. His counsel contend that the statute has prescribed his salary, which is in lieu of all fees or other compensation for his services (Laws, 1895, p. 77), except for furnishing to private parties copies of the records and files of his office, for which he is entitled to charge them ten cents a folio (Laws, 1901, p. 285); that Baker County is a private party, within the meaning of said act, and obliged to pay the fees prescribed for the performance of the duty enjoined, and, not having done so upon a demand therefor, the court erred in

issuing the peremptory writ. Plaintiff's counsel maintain, however, that, the act requiring the defendant to prepare and deliver the transcripts and papers not having provided for the payment of any fees, the work required is a part of his official duty, for the performance of which he is entitled to no compensation other than such salary.

1. The rule is well settled that the right of a public officer to compensation results from the constitution or a statute, and, unless the fees or salary is so attached to his office, he is entitled to none: *Steubenville v. Culp*, 43 Am. Rep. 417; *Fitzsimmons v. City of Brooklyn* (N. Y.), 7 N. E. 787 (55 Am. Rep. 835); *Conner v. City of New York*, 2 Sandf. 355; *Butler v. Pennsylvania*, 51 U. S. (10 How.) 402. When the compensation of a public officer is not limited by the constitution, he takes his office subject to such additional burdens as the legislative assembly may impose, and must discharge the attached duties without remuneration, unless the law provides for the payment thereof: *Haynes v. State*, 3 Humph. 480 (39 Am. Dec. 189); *Turpen v. Commissioners*, 7 Ind. 172; *Board v. Blake*, 21 Ind. 32; *People v. Devlin*, 33 N. Y. 269 (88 Am. Dec. 377); *Palmer v. City of New York*, 2 Sandf. 318. The constitution makes no provision for the payment to a county clerk of any compensation, and, his duties being subject to legislative control, the question arises, has the statute under consideration imposed upon him the burden of preparing the transcripts required, without providing for any fees therefor? The rule is inflexible that a public officer can demand only such fees as the law has prescribed for the performance of his official duties: *Jackson v. Siglin*, 10 Or. 93; *Pugh v. Good*, 19 Or. 85 (23 Pac. 827); *Houser v. Umatilla County*, 30 Or. 486 (49 Pac. 867).

2. The statute having provided for the payment of ten cents per folio for copies of the records and files in a county clerk's office furnished to a private party, it remains to be seen, when viewed in the light of the rules announced, whether Baker County is such a party, in respect to the clerk of Union County. In *Cole v. White County*, 32 Ark. 45, Mr. Justice

HARRISON, in construing a statute which provided that, in all cases where any officer or person is required to perform any duty for which no fees are allowed by any law, he shall be entitled to recover such pay as would be allowed for similar services, said: "Such general provision, however, does not embrace services required to be performed for the state or county; for it is also another well-settled rule that, in the construction of statutes declaring or affecting rights and interests, general words do not include the state or affect its rights, unless it be especially named, or it be clear, by necessary implication, that the state was intended to be included. * * * Counties are civil divisions of the state for political and judicial purposes, and are its auxiliaries and instrumentalities in the administration of its government. * * * It follows then, that counties, which are component and essential parts of the state, and the necessary agencies of its government,—embodiments of the public,—are no more embraced in the general words of the statute than the state itself." In that case the plaintiff sought to recover from the county of which he was clerk certain fees for services claimed to have been performed for it; and what the court may have said in respect to counties being component parts of the state, and as such not embraced in the general words of a statute prescribing fees for the performance of certain duties, applied only to the defendant county, and not to any other county of the state. In *Wortham v. County Court*, 13 Bush, 53, the clerk of Grayson County, insisting that, where the law does not direct by whom certain fees prescribed for the performance of official duties should be paid, the county was liable therefor, sought to recover from it compensation under a statute which allowed him to charge twenty-five cents for each order made in the county court. Mr. Justice ELLIOTT, replying to the contention, said: "It is sufficient answer to state that the state and county governments of this country never become debtors, by implication, to any of their agents, and that in order to hold them, or any of them, responsible for a claim, the claimant must show a legal obligation on their part to pay it."

3. In the case at bar the defendant, as the clerk of Union County, was not the agent of Baker County, and owed the latter no duties, except such as he was obliged to perform for private parties; and, the statute having prescribed that he might charge such parties a fee of ten cents a folio for copies of the records and files of his office, we think he is entitled to receive from Baker County such sum therefor.

4. Whatever the rule may be, however, in respect to the right of a public officer to demand from a private party the payment in advance of fees as a condition precedent to the performance of official duty, such a rule cannot, in the absence of express legislative authority, be applicable to a county, which, as a component part of the state, is a *quasi* public corporation. The authority to audit and allow claims against a county is vested in the county court, and, while the rate of compensation to which the defendant is entitled for the performance of his official duty is prescribed by law, the number of folios necessarily required to complete the transcripts cannot well be ascertained until the work has been completed. When this has been done, and the defendant's claim for compensation therefor has been filed, it will be incumbent upon the county court of Baker County to examine the transcripts, etc., to ascertain whether the work has been done as required by law, and to compute the number of folios necessarily included therein, in order to determine the sum due, and to issue a county warrant in evidence thereof. No statute can be found that directly or by reasonable intendment authorizes a public officer to demand payment in advance of his fees from a county.

5. It is argued, however, that Art. I, § 18 of the Constitution of Oregon, authorizes such a demand. That section is as follows: "Private property shall not be taken for public use, nor the particular services of any man be demanded, without just compensation; nor, except in case of the state, without such compensation first assessed and tendered." In *Daly v. Multnomah County*, 14 Or. 20 (12 Pac. 11), in construing a statute providing that, "in all criminal actions and proceed-

ings, witnesses residing within two miles of the place of trial, or the place where they are required to appear and testify, shall not be entitled to receive either witness fees or mileage," it was held that it did not contravene the section of the organic act under consideration, and that the services of witnesses in such cases are not "particular services," within the meaning of that clause, but are of the class of general services which every man is bound to render for the general as well as his own individual good. To the same effect, see *Morin v. Multnomah County*, 18 Or. 163 (22 Pac. 490).

But if it be assumed that the making of the required transcripts constitutes "particular services," within the meaning of the clause of the constitution alluded to, even then we do not think the defendant can demand from Baker County the payment of his fees in advance; for, the State of Oregon being exempt from the necessity of tendering such fees in advance, a county, which is a governmental division of the state, must also be exempted, on the principle that the greater includes the less. Judge COOLEY, in his work on Constitutional Limitations (6 ed.), p. 692, in discussing this question, says: "When the property is taken directly by the state, or by any municipal corporation by state authority, it has been repeatedly held not to be essential to the validity of a law for the exercise of the right of eminent domain that it should provide for making compensation before the actual appropriation. It is sufficient if provision is made by the law by which the party can obtain compensation, and that an impartial tribunal is provided for assessing it. The decisions upon this point assume that, when the state has provided a remedy, by resort to which the party can have his compensation assessed, adequate means are afforded for its satisfaction, since the property of the municipality or of the state is a fund to which he can resort without risk of loss." In *Branson v. Gee*, 25 Or. 462 (36 Pac. 527, 24 L. R. A. 355), it was held, in construing a statute authorizing a road supervisor summarily to take from the owner materials needed for the public roads, and another statute providing that the party aggrieved by such taking might apply

to the county court to have his damages assessed, there was not a taking of property without due process of law, and that under Art. I, § 18 of the state constitution, compensation need not be made before taking the property. To the same effect, see *Cherry v. Lane County*, 25 Or. 487 (36 Pac. 531). The burden being imposed by law upon Baker County to secure the transcripts, the claim for making them can be presented to the county court, and, if payment thereof be denied, or the amount disputed, the right of the matter may be determined in the circuit court for that county,—an impartial tribunal competent to afford an adequate relief. The defendant therefore had no legal right to insist upon such payment in advance, or to extort a promise therefor from the officers of Baker County upon the delivery of the transcripts and papers. The compensation for the performance of the work having been fixed, the law imposes upon Baker County the obligation to pay the fees so prescribed; but such compensation cannot be recovered until the work has been completed, the transcripts, etc., delivered, and the bill therefor, as a claim against the county, presented and filed.

6. It is unnecessary to consider whether Union County has a vested right to the taxes which it had levied upon the property situated in the territory purporting to have been annexed to Baker County; for section 7 of the act under consideration provides that the latter county shall assume and pay to the former such a part of its indebtedness, existing when the act took effect, less the cost of its county buildings, furniture, and fixtures, as the assessed value for the fiscal year of 1900 of the territory so annexed bears to the total assessed value of all the property in Union County for that year. It must be assumed that the territory so annexed to Baker County had been benefited to the extent of the pro rata share of the Union County indebtedness, if any existed; and, when the legislative assembly provided that this obligation should be discharged by Baker County, no rule of court could suggest a more equitable method of determining the measure of compensation than that adopted.

7. Whether the act annexing the territory in dispute to Baker County contravenes the organic law of the state in respect to imposing upon Union County an unequal part of the state taxes, it is also unnecessary to inquire; for this proceeding is not instituted to collect such tax, and the rule is quite uniform that the court will not, in a collateral proceeding, declare a state unconstitutional: *Stevens v. Carter*, 27 Or. 553, (40 Pac. 1074, 31 L. R. A. 342).

8. Section 1 of the act under consideration provides "that all that portion of the State of Oregon embraced within the following boundary lines, and heretofore a part of Union County, be and the same hereby is made a part of Baker County, to wit: Commencing at the intersection of the township line between townships six (6) and seven (7) south, range forty (40) east, with Powder River; thence east on said township line to the center of range forty-two (42) east; thence north to the township line between townships five (5) and six (6) south; thence east on said township line between townships five (5) and six (6) south to the Wallowa County line; thence easterly along the Wallowa County line to Snake River; thence up and along Snake River to the mouth of Powder River; thence up and along Powder River to the place of beginning:" Laws, 1901, p. 435. The southern boundary of Wallowa County from the source of the Minum River is in an easterly direction along the summit of the Powder River Mountains to a point about twenty miles due west from Snake River; thence due east to what is known as "Limestone Point," on the east line of the State of Oregon: Hill's Ann. Laws, § 2282. From an examination of a map of the state, it would appear that the line of Baker County, as described in the act under consideration, in the call extending east between townships 5 and 6 south, does not intersect, but runs south of, the summit of the Powder River Mountains; and it is contended by defendant's counsel that this fact renders the act describing the territory in dispute void for uncertainty.

In order to ascertain where the power lies to assess property and collect taxes therefrom, to determine the jurisdiction

of courts over the subject-matter of civil and criminal actions, of probate matters, and of the right of a citizen to vote for county officers, the location of the boundary of a county ought to be reasonably certain. These and many other reasons might be given to show that the boundaries of a county ought to be fixed definitely by the legislative assembly, and assuming, without deciding, that the rule in that respect is the same as that for construing the descriptive part of a conveyance of real property, we will examine the act under consideration, to see if it is void for uncertainty. In prescribing a rule of evidence for construing doubtful descriptions in a conveyance of real property, our statute contains the following provision: "When permanent and visible or ascertained boundaries or monuments are inconsistent with the measurement, either of lines, angles, or surfaces, the boundaries or monuments are paramount": Hill's Ann. Laws, § 855, subd. 2. In *Hale v. Cottle*, 21 Or. 580 (28 Pac. 901), it was held that the rule that monuments control courses and distances in construing descriptions of land is not an inflexible one, and if it appear from the face of a conveyance, in the light of surrounding circumstances, that the courses and distances, as given, correctly describe the land intended to be conveyed, they will, of course prevail. In *White v. Luning*, 93 U. S. 514, it was held that the rule that monuments, natural or artificial, rather than courses and distances, control in the construction of a conveyance of real estate, will not be enforced, when the instrument would be thereby defeated, and when the rejection of a call for a monument would reconcile other parts of the description, and leave enough to identify the land. It is possible that the line, commencing at the point indicated, and extending east between townships 5 and 6 south, would intersect the south boundary of Wallowa County, but, if such is not the case, it would be extremely difficult to locate the line with any degree of certainty; for no point in the south boundary of said county having been indicated, to which the line from the center of the north boundary of township 42 east, range 6 south, was extended, it follows that as many lines, at different angles, could be run from the

center of said township, as there are separate points on the south boundary of Wallowa County, the length of which is about forty miles. Under these circumstances, we cannot disregard the course given, and adopt the boundary indicated. In *Fratt v. Woodward*, 32 Cal. 219 (91 Am. Dec. 573), it is held that the law will presume a straight line was intended in a description of land in a deed, when the call is simply from one monument to another; but when the call is from a monument to a creek, without naming a given point, the creek is not a monument in the sense of that rule. In the case at bar, no point having been designated in the south boundary of Wallowa County, to which the line was to be extended, the summit of the Powder River Mountains, which constitutes said boundary, is not a monument; and it must be disregarded, unless it should be discovered that an extension of the line indicated intersects the south boundary of Wallowa County at any point from which the line necessarily follows said boundary to the Snake River. Where the description in a deed is true in part, but not in every particular, so much of the description as is false is rejected, and the instrument will take effect if a sufficient description remains to ascertain its application: 1 Greenleaf, Evidence, § 301. Applying this rule to the boundary of Baker County as indicated by the act under consideration, we think the legislative assembly intended the line to be run on a due east course from the center of the boundary of said township 42 east, to the Snake River, unless it intersected the south boundary of Wallowa County, by disregarding which the description is sufficiently certain.

9. It is contended by defendant's counsel that the act attempting to annex the disputed territory to Baker County is a local and special law; that more than eight hundred registered electors reside in said territory, who are interested in the question of annexation; and that, no provision having been made by the legislative assembly that the act should be submitted to them, to be operative or not in accordance with their vote, it contravenes the constitution of the state, Art. I, § 21, which is as follows: "No *ex post facto* law, or law impairing

the obligations of contracts, shall ever be passed, nor shall any law be passed, the taking effect of which shall be made to depend upon any authority, except as provided in this constitution; provided that laws locating the capital of the state, locating county seats, and submitting town and corporate acts, and other local and special laws, may take effect or not, upon a vote of the electors interested." It is argued that the clause of the constitution that "local and special laws may take effect or not, upon a vote of the electors interested," is a limitation of power, and prohibits the legislative assembly from making the act annexing said territory to Baker County to take effect, except upon the authority of their votes in favor thereof. In *Maxwell v. Tillamook County*, 20 Or. 495 (26 Pac. 803), Mr. Justice LORD, in defining the terms "local" and "special," as applicable to and qualifying statutes, says: "In general language, a local statute may be said to be one that is operative only within a portion of the state, and a special statute is one that is applicable to particular individuals or things." According to this definition, the act attempting to annex a part of Union County to Baker County is evidently local and special.

10. It remains to be seen whether the constitution of the state requires the act to be submitted to the electors interested before it could become operative. If the word "may," as used in Art. I, § 21, of the organic act of the state, is to be construed as "must," making it obligatory upon the legislative assembly to submit all local and special laws to a vote of the electors interested, to take effect or not, in accordance with their expressed will as evidenced by a majority of their votes cast, such a conclusion would necessarily render nugatory many acts of the legislative assembly that have been regarded as valid, thereby disturbing titles and producing incalculable injury to those having made investments on the faith thereof. It will be conceded, we think, by disinterested persons, that such a construction of local and special statutes should be avoided, unless the constitution clearly and in unmistakable terms commands that such acts should be submitted to the electors interested for their approval before they become

operative. The clause, "provided that laws locating the capital of the state, locating county seats, and submitting town and corporate acts, and other local and special laws, may take effect or not, upon a vote of the electors interested" (Const. Or. Art. I, § 21), is, in our opinion, neither a grant nor a limitation of power, but qualifies the preceding clause, and excepts therefrom the particular acts enumerated in the qualifying clause, which the legislative assembly, in its discretion, may submit to the electors interested for their approval or rejection.

In *McWhirter v. Brainard*, 5 Or. 426, the court, in speaking of an act providing for the location of a county seat at either of five designated places, as the electors of the county might declare by a majority vote, says: "The power of location is exercised by the legislative assembly, but it takes effect in a particular mode, or not at all, by a vote of the electors interested." It is maintained that the language quoted is directly in point, and the authority controlling in this case. If it was meant by the decision relied upon that all local and special laws must be submitted to the electors interested for their approval by a majority vote before such acts could become operative, we cannot yield our consent to such a conclusion. The court was evidently discussing the necessity for complying with the provisions of an act which required that the location of a county seat should be determined by a vote of the electors interested, and what was there said must apply to the particular facts involved; that is, the legislative assembly having prescribed the mode in which the act was to take effect, the method indicated was exclusive, and, if not pursued, the act could not take effect. We do not think the constitution of this state makes it obligatory upon the legislative assembly in any instance, except in the original selection or subsequent relocation of the seat of government (Const. Or. Art. XIV, §§ 1, 3), to submit a local or special act to the electors interested for their determination by a majority vote before such act can become operative; but it may, in its discretion, so submit local and special laws, and when it does so the manner prescribed must

be pursued before the act can become operative. As was said in *McWhirter v. Brainard*, "It takes effect in a particular mode, or not at all, by a vote of the electors interested." We do not wish to be understood as intimating that if the legislative assembly, in its discretion, had seen fit to submit the question of annexation of the disputed territory to Baker County, the electors residing in the territory affected by the change were the only ones interested therein. The legislative assembly is vested with plenary power, and may divide counties at its pleasure, apportioning the common property and common burdens in such manner as to it may seem reasonable and equitable [*Morrow County v. Hendryx*, 14 Or. 397 (12 Pac. 806); *Templeton v. Linn County*, 22 Or. 313 (29 Pac. 795, 15 L. R. A. 730)], provided no county shall be reduced to an area of less than four hundred square miles (Const. Or. Art. XV, § 6).

11. It is contended by defendant's counsel that the legislative assembly on February 7, 1899, having apportioned the senators among the several counties of the state according to the population of each, and placed Union County in the Twenty-Second and Twenty-Fourth districts, was powerless, until another enumeration of the inhabitants had been made by the United States or this state, to change the boundaries of said districts, or to transfer any of the inhabitants of the territory purporting to have been annexed to Baker County to the Twenty-Fifth senatorial district, and that its attempt to do so violates the state constitution, Art. IV, §§ 3, 5, 6, and 7. The sections referred to are as follows:

"Sec. 3. The senators and representatives shall be chosen by the electors of the respective counties or districts into which the state may from time to time be divided by law."

"Sec. 5. The legislative assembly shall, in the year eighteen hundred and sixty-five, and every ten years after, cause an enumeration to be made of all the white population of the state."

"Sec. 6. The number of senators and representatives shall, at the session next following an enumeration of the inhabitants by the United States or this state, be fixed by law, and appor-

tioned among the several counties according to the number of white population in each. And the ratio of senators and representatives shall be determined by dividing the whole number of white population of such county or district by such respective ratios; and when a fraction shall result from such division, which shall exceed one half of such ratio, such county or district shall be entitled to a member for such fraction. And in case any county shall not have the requisite population to entitle such county to a member, then such county shall be attached to some adjoining county for senatorial or representative purposes."

"Sec. 7. A senatorial district, when more than one county shall constitute the same, shall be composed of contiguous counties, and no county shall be divided in creating senatorial districts."

It is argued that the legislative assembly, having apportioned the number of senators among the several counties of the state, exhausted the measure of power delegated, and was without authority, until another federal or state enumeration of the inhabitants was taken, to make a reapportionment. In support of this principle several cases are cited, but in most of them the constitutions of the respective states prohibited a reapportionment until another enumeration could be taken. Thus, in *People ex rel. v. Holihan*, 29 Mich. 116, it was held that the legislature had no authority to enlarge the boundaries of a city by annexing to it parts of adjoining townships in such manner as to interfere with the boundaries of representative districts at a time when any alteration therein was forbidden by the constitution, which provided for the apportionment of senators and representatives among the counties and districts according to the number of inhabitants in 1854 and every ten years thereafter, and also contained the following clause: "Each apportionment and the division into representative districts by any board of supervisors shall remain unaltered until the return of another enumeration." In *People ex rel. v. Board of Sup'rs*, 147 N. Y. 1 (41 N. E. 563, 30 L. R. A. 74), by an act of the legislature of New York a part of the

county of Westchester was annexed to the county of New York, and it was contended that said act violated the constitution of that state, which provided that an enumeration of the inhabitants should be taken in the year 1905, and every tenth year thereafter, and directed that the senate districts "shall be so altered by the legislature at the first regular session after the return of every enumeration, that each senate district shall contain as nearly as may be an equal number of inhabitants, excluding aliens, and be in as compact a form as possible, and shall remain unaltered until the return of another enumeration, and shall at all times consist of contiguous territory, and no county shall be divided in the formation of a senate district except to make two or more senate districts wholly in one county." It was held that the power to divide counties or towns, and erect new counties and towns, or to change their boundaries, is conferred by the general grant of legislative power, but the time and mode of exercising which are in the discretion of the legislature, unless restrained by other provisions or arrangement of the constitution. It will be observed that the constitutions of Michigan and New York contain express prohibition against the alteration of representative and senatorial districts after they have been established in pursuance of the mode prescribed. Union County was not divided for the purpose of creating a senatorial district, but the boundaries of the senatorial districts were changed to conform to the amended boundaries of Baker and Union counties. The legislative assembly provided that the territory annexed to Baker County should be exempt from the civil and military jurisdiction of Union County, and subject to the civil and military jurisdiction of Baker County. This provision, in our judgment, is broad enough to entitle the qualified electors in the territory so annexed to vote in Baker County for all purposes. In *Pulaski County v. Judge of Saline County*, 37 Ark. 339, it was held that transferring a part of a county in one senatorial district to another county in a different senatorial district constitutes no change in those districts. They are composed

of the same counties as before. Counties, not territory or inhabitants, are the constituents of the districts.

No error having been committed by the court in sustaining the demurrer, it follows that the judgment is affirmed.

AFFIRMED.

Argued 21 November ; decided 16 December, 1901.

RATHBONE v. OREGON RAILROAD COMPANY.

[66 Pac. 909 ; 11 Am. Neg. Rep. 138.]

NEGLIGENCE AS TO TRESPASSER ON RAILROAD TRACK.

Deceased, while riding on a hand car with and by invitation of a section foreman, was killed by an irregular train, which came around a sharp curve at a high rate of speed. There was no time to check the train after the car came in sight. The negligence charged was in running such a train around the sharp curve at a dangerous rate of speed without signals or precautions to discover whether there were persons on the track. The foreman, without the knowledge and against the rules of the defendant, had been accustomed to take persons over this piece of road on hand cars. *Held*, that the deceased was a trespasser, and the only duty the railroad company owed him was to exercise reasonable care to avoid injuring him after his presence on the track was discovered: *Ward v. Southern Pac. Co.* 25 Or. 433, followed; *Cederson v. Oregon Nav. Co.* 38 Or. 343, 359, cited.

From Multnomah: ALFRED F. SEARS, JR., Judge.

Action by Ella Rathbone against the Oregon Railroad & Navigation Company for damages. There was a judgment for plaintiff and defendant appeals. REVERSED.

For appellant there was a brief over the name of *Cotton, Teal & Minor*, with an oral argument by *Mr. Wm. W. Cotton*.

For respondent there was a brief over the names of *Joseph & Schlegel*, and *Watson & Beekman*, with an oral argument by *Messrs. Edw. B. Watson and Frank Schlegel*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is an action to recover damages for the death of Charles A. Rathbone, alleged to have been caused by the negligence of the defendant. The facts are that on Sunday, June 13, 1897, Rathbone and his wife, at the invitation of one of defendant's section foremen, went with him and his family on a hand car from Rooster Rock to Corbett, a distance of about a mile and a half, to "get some cherries to can." Upon their return, while passing around a curve in the road, where the view is obstructed, a collision occurred between the hand car and one of defendant's trains going west, and Rathbone was killed. The evidence shows that when the train and hand car came in view of each other they were so near that neither could be stopped in time to avoid the collision, and no negligence is charged against the operators of the train on this account. The ground of negligence alleged, omitting some averments upon which there was no proof whatever, is, in substance, that the defendant's roadbed and track between the stations named had been so continuously used since their construction by people traveling on foot, bicycles, and hand cars, with the knowledge and permission of the company, that it was bound to exercise reasonable caution to avoid injuring persons so traveling thereon; that, in disregard of its duty in this respect, it carelessly and negligently ran an irregular train, composed of a locomotive with an observation and baggage car in front, around sharp curves and embankments, and against the hand car upon which the deceased was riding, at a high and dangerous rate of speed, without ringing the bell, sounding the whistle, or giving any notice of its approach, or taking any precaution whatever to discover whether there was any person on or near the track in front of such train. The testimony, however, does not show that people not connected with the railroad company had used the track at the place indicated in any way except by riding upon a hand car thereon, or that the track was used in this way by the public generally, but is to the effect that from Corbett east for some miles the defend-

ant's roadbed is located along the Columbia River, at many places wholly occupying the space between the river and a high bluff which rises above it; that the country in the vicinity is very sparsely settled, and the means of communication between the different stations are very imperfect, except by the railway; that for sometime prior to the accident, the defendant's section foremen, as an accommodation, had been accustomed to invite people living in the vicinity of the road to ride with them on hand cars, and had often used such cars to take their families and neighbors up and down the track on business and pleasure. This was not only without the authority of the company, but against its rules, and there is no testimony to show that it ever came to the attention of defendant's officers or agents; nor was the physical evidence of such use of a character that would impart knowledge thereof. The deceased was therefore riding on the hand car without permission, express or implied, from the company, and against its rules. Under all the authorities, the only duty it owed him under such circumstances was to exercise reasonable care not to injure him after his presence on the track was discovered. Except at public crossings or on public highways, the track of a railroad company is its private property, upon which no unauthorized person has a right to be. Its free and unobstructed use is not only essential to the transaction of the company's business, but to the safety of passengers on its trains. One who uses the track or right of way for his own convenience or pleasure, without the permission or invitation of the company, occupies the position of a mere trespasser. The company is under no legal duty or obligation to take precautions or to keep a lookout for him, its only duty being to use reasonable care not to injure him after he is discovered: *Ward v. Southern Pac. Co.* 25 Or. 433 (36 Pac. 166, 23 L. R. A. 715, 60 Am. & Eng. R. Cas. 34, with note); *Cederson v. Oregon Nav. Co.* 38 Or. 343 (63 Pac. 763, 21 Am. & Eng. R. Cas. 624).

Nor did the fact that Rathbone was riding on the hand car at the invitation of the section foreman in any way change or enlarge the duty or obligation of the defendant toward him.

The section foreman was not the agent of the company for any such purpose, and could not bind it by his acts. He was not engaged in carrying passengers, nor is a hand car used for such purpose. The deceased was not entitled to the rights of a passenger [*Gulf, Cal. & S. F. R. Co. v. Dawkins*, 77 Tex. 228 (13 S. W. 982); *Hoar v. Maine Cent. R. Co.* 70 Me. 65 (35 Am. Rep. 299)], but was wrongfully upon the track, notwithstanding he was there by invitation of the foreman (*Snyder v. Hannibal & St. J. R. Co.* 60 Mo. 413; *Flower v. Pennsylvania R. Co.* 69 Pa. St. 210 (8 Am. Rep. 251); *Duff v. Allegheny Val. R. Co.* 91 Pa. St. 458 (36 Am. Rep. 675); *Keating v. Michigan Cent. R. Co.* 97 Mich. 154 (56 N. W. 346, 37 Am. St. Rep. 328); *Craig v. Mt. Carbon Co.* 45 Fed. 448; *Ream v. Pittsburgh, etc. R. Co.* 49 Ind. 93]. He consequently had no right to complain of the manner in which the train was made up or the way in which it was operated. These things, so far as he was concerned, were purely within the discretion of the company. Negligence is a breach of a legal duty, and, before any action can be maintained therefor, there must exist some obligation or duty toward the plaintiff that the defendant has left undischarged or unfulfilled. The defendant owed no legal duty to the deceased, except not to wantonly or intentionally injure him because he was wrongfully upon its track or right of way, and therefore it cannot be charged with negligence upon mere proof of the manner in which it ran or managed its train.

It follows that the judgment of the court below must be reversed, and the case remanded for such further proceedings as may appear necessary, not inconsistent with this opinion.

REVERSED.

Argued 13 November; decided 16 December, 1901.

HAINES v. CADWELL.

[66 Pac. 910.]

40	229
46	166

EVIDENCE—CONCLUSIVENESS OF MEMORANDUM.

1. The memorandum contemplated by Section 692 of Hill's Ann. Laws, is one containing the terms of the agreement between the parties, and one that refers to or includes only a part of a transaction is not conclusive to the exclusion of oral testimony.

BANKS—ADVANCES ON SECURITY NOTE.

2. Defendants executed a note to plaintiff, a banker, to secure a present payment and future advances if he should choose to make any. After he had refused to make further advances, defendants deposited certain drafts, which were credited to their account. When one of the drafts was paid, a clerk credited the amount to them, not knowing that it was credited before. On discovering the mistake, plaintiff charged the amount back to defendants, but they checked against the amount so credited, and plaintiff honored the checks. *Held*, in an action on such note, that the amount so paid on such checks should be considered as advanced under such agreement.

WITNESS REFRESHING MEMORY BY MEMORANDUM.

3. In an action by a banker to recover advances made to defendants, a clerk who kept the bank books, and knew them to be correct, may refresh his memory, while testifying, by consulting memoranda copied from the books, and carefully compared by him, if after so using it, he is enabled to testify from memory of the original transactions.

HARMLESS ERROR IN ADMITTING EVIDENCE.

4. Error committed in admitting evidence is rendered harmless by subsequently receiving other unobjectionable evidence covering the same point.

TRIAL—PLEADINGS AND PROOFS.

5. No error is committed in excluding testimony offered in support of issues not made by the pleadings; nor is it error to exclude part of such testimony after having improperly admitted some.

INSTRUCTION—ESTOPPEL TO OBJECT.

6. Where defendant has introduced evidence in support of an attempted counterclaim, which is not at issue because of defective pleading, and plaintiff has given evidence in rebuttal thereof, defendants cannot complain of a charge as to the effect of such evidence if found true.

From Washington: THOS. A. McBRIDE, Judge.

Action by E. W. Haines against E. P. Cadwell and Laura M. Cadwell. From a judgment for plaintiff, defendants appeal.

AFFIRMED.

For appellants there was a brief over the name of *H. T. Bagley*, with an oral argument by *Mr. H. C. Watson*.

For respondent there was a brief and an oral argument by *Mr. Samuel B. Huston*.

MR. JUSTICE WOLVERTON delivered the opinion.

It is alleged in the complaint that plaintiff is engaged in the business of banking at Forest Grove, Oregon; that on May 8, 1899, the defendant E. P. Cadwell had overdrawn his account at the bank to the amount of \$444.57, and desired further credit; that, in order to pay this balance, and to secure the payment of such drafts as he might draw upon the bank, and such advances as it would be convenient for plaintiff to make, the defendants executed and delivered to plaintiff their certain promissory note for \$2,000, payable in ninety days, with interest at the rate of eight per cent. per annum; that at the date of the execution of said note the plaintiff, at the request of the defendants, credited Cadwell's account with the sum of \$775; that subsequently Cadwell drew checks upon the bank, which were honored and paid, aggregating \$170.95 more than he had deposited to his account, and judgment is demanded in that sum. The complaint was amended at the trial by leave of the court to make it show that the plaintiff advanced and paid other moneys, aside from the checks alluded to, on Cadwell's account, and for the use and benefit of the defendants. The defendant's answering separately, deny that the note was made or executed in pursuance of any other agreement than that set forth and contained in a certain writing dated "Forest Grove, Oregon, May 8, 1899," or that at any time since they, or either of them, received any money whatever on said note, other than the said \$775 placed to the credit of E. P. Cadwell at the time of its execution, and allege, in substance, that he subsequently requested an advance under the terms of said agreement of May 8, which was refused, and that on July 29, 1899, he paid plaintiff the full amount due upon said note, and demanded its surrender.

1. At the trial, and while plaintiff was under examination in his own behalf, he was permitted to state the understanding and agreement under which the note was executed, over the objection that it was not the best evidence, the agreement being in writing; and the ruling of the court in this respect is assigned as error. The writing was subsequently introduced by the defendants, and is as follows:

“Forest Grove, Oregon, May 9, 1899.

“This may certify that of this note for \$2,000 dated May 8, 1899, signed by E. P. Cadwell and Laura M. Cadwell, but \$775 has been advanced, leaving \$1,225 which has not been paid, and which may be advanced or not, at the option of said E. W. Haines. If said note should be paid before any further advances are made, \$775 and interest would pay and satisfy the same in full.

“[Signed] E. W. HAINES.”

This document is but a memorandum showing the state of the account at the time, and does not purport to contain the terms of the agreement between the parties as to the conditions under which the note was given; and it was not error, therefore, to admit the oral statement thereof.

2. It appears from the testimony that some six or seven weeks before June 6, the defendant E. P. Cadwell, having money with the Hilo Mercantile Company of Hilo, Hawaiian Islands, drew on the company in favor of the plaintiff for \$250, which amount was placed to his credit in the bank, and the draft sent on for collection. On June 6, having received returns, one of the bank clerks, not being advised of the credit theretofore given Cadwell, again credited him with the amount with other collections made at the same time. About that time, and before the mistake was discovered, Cadwell asked for a statement of his account with the bank, which, being rendered, showed a balance in his favor of \$248.64, whereupon he drew three drafts upon the bank covering this balance, which were all paid,—one on June 15, and another on June 19, 1899. On June 12, when the mistake was discovered, the plaintiff at once debited Cadwell's account with \$250, and notified him by telegram, which was delivered on the thirteenth. On May 23 of

that year plaintiff declined to make any further advances to the defendant, and on July 28 the latter paid him \$778.83, which was received in payment of the \$775, and interest thereon to date, and was to be credited on the note of \$2,000. Subsequently other sums were received from the defendant Cadwell, aggregating \$90.46. Now, in this state of the record, it is contended that, as the plaintiff had, through his own mistake, extended the defendant additional credit, who was thereby induced to overdraw his account, plaintiff could have no action upon the note, because it was not such an advance of money as the note was made to secure. In elucidation, one of the defendant's counsel says in his brief: "How could it be regarded as such, when defendant had made a request for a further advance, which was refused by the plaintiff, and the money which was advanced was advanced by plaintiff and received by the defendant by mutual mistake? * * * Plaintiff has a remedy, but we submit that it was not by an action on the note, which provides for the payment of attorney's fees in addition to other charges." The objection is refined and highly technical, and, we think, without merit. The plaintiff alleges that the note was given to secure further advances in such amounts and at such times as it might be convenient for him to make, and the testimony tends to the establishment of the allegation. Now, although the plaintiff had refused at one time subsequent to entering into the agreement to extend further credit on account of the note, it appears that he paid two of the drafts, aggregating \$148.64, drawn upon the rendition of the erroneous statement after the discovery of the mistake. Extension of credit or the placing of the \$250 to the credit of Cadwell's account by mistake of plaintiff did not obligate him to pay the drafts, and he might have refused to honor them; so that it would seem that plaintiff really made the advancements, so far as these latter items are concerned, voluntarily and intentionally, notwithstanding Cadwell's account had been erroneously credited and an erroneous statement rendered. This disposes of any mutuality between the parties as to the alleged mistake, as the greater portion of the recent advances was

made by plaintiff with full knowledge of the true conditions. But, however this may be, the fact remains that defendant had an account with the bank at the time, and the note was given to secure further advances thereon, as well as the deficit that had accumulated. The account continued running, and the liability was incurred in the course thereof. The fact that an item of credit was given by mistake of plaintiff, and defendant had availed himself of the opportunity, and had drawn against the bank to cover the amount thereof, renders it none the less an advance or extension of credit under the terms of the agreement. The account had never been closed, nor had the note been surrendered, so that the obligation to answer for the advance continued, and the action was properly instituted. There were some instructions asked and refused, which present the same question; hence it is not necessary to notice them further.

3. In the course of the trial, while F. T. Kane was being examined as a witness for the plaintiff, he was permitted to testify from a memorandum of the bank account with defendant Cadwell, and error is predicated thereon. The record shows that the witness was the cashier of the bank; that its books were kept under his direction and supervision, and he knew them to be correct; that the memorandum used was copied from the books, and by him carefully compared, so that he knew the same to be a true transcript therefrom. This was sufficient to entitle him to refresh his memory, if, after so using it, he was enabled to testify from memory of the original transactions: Bradner, Ev. p. 468.

4. But, if this were not so, the books themselves were subsequently offered and admitted in evidence, and this was corrective of any error that may have been made as to the use of the memorandum relative to their contents.

5. E. P. Cadwell attempted to set up a counterclaim in substance as follows: That on about August 15, 1898, defendant sent plaintiff \$4,000, to be used and invested in accordance with a letter of instructions dated August 18, 1898; that on September 8 plaintiff acknowledged the receipt of the money.

and agreed to use and invest the same in pursuance of the instructions, but, failing to comply therewith, used and invested the money for his own benefit; and it is sought to charge him with interest for the time he had the money in his bank. While Cadwell was a witness in his own behalf, he identified his letter of instructions accompanying the draft for \$4,000, which was thereupon introduced in evidence. It directed the plaintiff to put the money out at interest for six and nine months at the best rates possible, if he could find good, safe loans; but that, if he was unable to secure the loans, then to issue a certificate of deposit at the usual rates. The latter further directed plaintiff to advance Prof. J. W. Marsh such amounts as he should ask, and take his receipts therefor. It was further shown that plaintiff came into possession of the money September 15; that a portion of it had been paid out to Marsh, which, with payments on Cadwell's drafts on him, reduced the amount, March 8, to \$2,300. Thereupon Cadwell offered to show by plaintiff's books that from September, 1898, to March, 1899, inclusive, plaintiff had all his deposits in the bank loaned out, with which was included the \$4,000 that defendant had sent him; but was not permitted to do so, and error is assigned.

There is one reason lying at the very base of the attempted counterclaim sufficient to justify the exclusion of the testimony offered, and that is the answer does not state facts upon which the counterclaim can be supported. It alleges that defendant forwarded to plaintiff \$4,000 to be invested in accordance with a letter of instructions, but the manner of the instructions is nowhere set out, so that there are no facts alleged constituting any agreement as to loaning the funds on the part of the plaintiff, and there can be no breach without prior agreement. So that the evidence was not admissible under the pleadings, and was therefore properly excluded. True, the court let in the letter of instructions, but it amounted to a mere matter of grace and favor, as it was not legitimately admissible. In rebuttal, plaintiff was permitted to show that he had made all reasonable efforts to loan the money, but was

unable to do so, and some further matters in excuse for not complying with the instructions; and it is insisted that the court erred in this particular, as no justification was pleaded. The fact remains that the issue need not have been submitted touching the \$4,000 transaction, because no proper counter-claim regarding it had been pleaded; but, as defendant had introduced some evidence of an undertaking on the part of the plaintiff, it was not inappropriate to permit him to show why he could not comply with the conditions. The undertaking, if one was entered into, was that plaintiff would loan the money if he could, and the evidence admitted was to the effect that he was unable to put it out after repeated efforts. The defendant, having brought the controversy into the record, cannot consistently complain of the opportunity afforded the plaintiff to disprove his contention. There was an instruction asked by the defendant with reference to the same matter, which was properly refused for a like reason, and for the further reason that it did not aptly state the issues pertaining thereto.

6. The court instructed the jury, however, that, if it was impracticable to send the defendant a certificate of deposit for the reasons given, it would be the duty of the plaintiff to keep the money in the bank, subject to the order of the defendant; and this is complained of as being without the issues. But the defendant made the instruction necessary by introducing his letter directing the issue of the certificate if plaintiff was unable to put the money out at interest, and the lack of knowledge of defendant's address afforded ample excuse for not sending the certificate. It was, therefore, within the issues thus brought into the trial of the cause by the defendant, and he is not in a position to urge the objection.

There are some other questions of minor importance not especially urged, all of which have been considered, and, finding no error in the record, the judgment of the court below will be affirmed.

AFFIRMED.

Argued 26 November; decided 23 December, 1901.

SEARS v. DAVIS.

[66 Pac. 913.]

FRAUDULENT CONVEYANCE—MISTAKE—INNOCENT CREDITOR.

1. A person who has permitted another to obtain and hold the title to his real property for many years, and until after others have extended credit in reliance on such apparent ownership, is estopped thereby from asserting his claim as against such creditors. As an example, where a husband purchased land with his wife's money, and by mistake the conveyance was in his name, but the wife was notified, and allowed the husband to manage the estate as though it were his own for twenty-eight years, a conveyance from the husband to the wife should be held void as to creditors who became such on the faith of the husband's apparent ownership.

CORRESPONDENCE OF ALLEGATIONS AND PROOFS.

2. Parties cannot prosecute or defend legal proceedings except on the grounds stated in their pleadings—thus, in a suit to declare a deed from a husband to his wife void as in fraud of judgment creditors, the defense that the land was a homestead and not subject to sale on execution, cannot be urged unless pleaded.

From Polk: REUBEN P. BOISE, Judge.

Bill by Van B. Sears, executor of the estate of Isaac Ball, deceased, against J. M. Davis and others. From a decree for defendant, plaintiff appeals. REVERSED.

For appellant there was a brief and an oral argument by *Mr. Oscar Hayter*.

For respondents there was a brief over the names of *J. H. Townsend*, and *Butler & Coad*, with an oral argument by *Mr. N. L. Butler*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is a suit to set aside a conveyance from J. M. Davis to his wife, and to subject the property to the lien of plaintiff's judgment. The complaint alleges that the conveyance was made for the purpose of defrauding creditors. The answer denies the fraud charged, and for affirmative defense avers that in 1866 the defendant Davis purchased the property in controversy for his wife, with her money, but by mistake the

deed was made in his name, and through inadvertence he failed and neglected to convey it to her until December, 1895. The decree was in favor of the defendants, and plaintiff appeals.

1. There is no substantial conflict in the testimony. In 1866 Davis contracted for the purchase of the Eldridge donation land claim for his wife. A part of the purchase money was paid at the time, and a bond for a deed given by Eldridge, which, by mistake of the scrivener, was made in favor of Davis. When the balance of the consideration was paid, in March, 1867, Eldridge refused to make the deed to Mrs. Davis, although the money was furnished by her, but instead made it in her husband's name, according to his bond. She was immediately advised of that fact, however, but suffered and permitted the deed to be placed of record, and the apparent title to the property to remain in her husband, until December, 1895, when the conveyance now sought to be set aside was made. In the meantime Davis occupied and cultivated the premises, sold and disposed of the proceeds thereof as his own, and in fact managed and dealt with the property as if it belonged to him, and was generally reputed in the community to be the owner thereof. In 1889, while the title thus stood in his name, he borrowed of one Isaac Ball \$300, giving his promissory note therefor. Ball died in February, 1895, and plaintiff was appointed executor of his estate. In June following Davis applied for an increase in the loan to \$500, when the plaintiff told him that he thought that the estate ought to have security. Davis said he would give a mortgage upon his land for that purpose, but that there was already a mortgage thereon for \$1,500, and, upon his promising to repay the money upon three days' notice, the plaintiff accepted a new note for \$500, dated July 6, 1895, without requiring security. In order to verify Davis' statement, however, he examined the records, and found the title to the property to be in Davis as he had represented, although the testimony does not clearly show whether this examination was made before or after the note was executed. In December, 1895, the plaintiff endeavored to collect the note, when he ascertained for the first time

that Davis had transferred the property to his wife. He thereupon commenced an action upon the note, in due time obtained judgment thereon, and thereafter brought this suit. Upon these facts the only question to be considered is whether Mrs. Davis is estopped from setting up title to the property as against the plaintiff.

Under our statute the property and pecuniary rights of a married woman are not subject to the debts and contracts of her husband: Hill's Ann. Laws, § 2992. But when she voluntarily permits her husband to retain the apparent title to her property and to deal with it as his own for twenty-eight years, as the testimony shows to have been the fact in this case, she is estopped from afterwards asserting her claim as against creditors of the husband who have dealt with him upon the faith of his apparent ownership: 2 Pomeroy, Eq. Jur. (2 ed.), § 814; *Galbraith v. Lunsford*, 87 Tenn. 89 (9 S. W. 365, 1 L. R. A. 522); *Pierce v. Hower*, 142 Ind. 626 (42 N. E. 223); *Geo. Taylor Com. Co. v. Bell*, 62 Ark. 26 (34 S. W. 80); *Warner v. Watson*, 35 Fla. 402 (17 South. 654); *Swartz v. McClelland*, 31 Neb. 646 (48 N. W. 461); *Roy v. McPherson*, 11 Neb. 197 (7 N. W. 873); *Hopkins v. Joyce*, 78 Wis. 443 (47 N. W. 722); *Leete v. State Bank of St. Louis*, 115 Mo. 184 (21 S. W. 788). This doctrine proceeds upon the principle, as stated by Mr. Justice ELLIOTT in *Hirsch v. Norton*, 115 Ind. 341 (17 N. E. 612), that: "Where a party, by clothing another with all the legal *indicia* of ownership, enables him to mislead others, he, and not those who are misled by his acts, must be the sufferer. If loss comes, the man who invested the debtor with the evidence of absolute title, and thus misled creditors, must bear it, and not the creditors. The conclusion we assert involves little more than the application of the familiar general principle that, where one of two innocent persons must suffer by the act of a third, he must suffer who put it in the power of the third to do the act." It is said that there is no evidence of Davis having represented to plaintiff that he owned the property in controversy. The answer to this objection depends upon the construction of the testimony upon a

point not made clear. But, however that may be, it does appear that for more than twenty-five years, with the knowledge of Mrs. Davis, the title to the property remained of record in her husband. During all the time he was apparently, to all intents and purposes, the owner thereof, and the conclusion is irresistible that the loan was made by Ball in the first instance, and the renewal note taken by plaintiff thereafter on the faith of his ownership. Whether plaintiff's examination of the record was made before or after the execution of the renewal note, he no doubt acted upon the information he thus obtained, either in making the loan, or in forbearing to enforce its collection prior to the transfer complained of.

2. A contention is made that the property is a homestead, not subject to sale under execution, and therefore the conveyance could not have been a fraud upon creditors. No such defense is made by the answer, nor does the evidence show the value of the property, so that we are unable to determine at this time whether or not it is exempt under the provisions of the homestead act.

The decree of the court below is reversed, and a decree will be entered here declaring the deed from Davis to his wife void as to the lien of plaintiff's judgment. REVERSED.

Argued 14 November; decided 16 December, 1901.

MILOS v. COVACEVICH.

[66 Pac. 914.]

SALE—PAYMENT OF PRIOR DEBT—STATUTE OF FRAUDS.

1. An oral agreement to pay and receive personal property worth more than \$50 in payment of an antecedent debt is within the requirement of the statute of frauds and void.

RECEIPT AS A CONTRACT—PAROL EVIDENCE.

2. A mere receipt is always open to parol explanation, but when it is also the expression of a contract, it is subject to the same rules as other contracts.

From Multnomah: ALFRED F. SEARS, JR., Judge.

This is an action by Mark Milos against Peter Covacevich to recover \$225 for the breach of a contract to deliver a fishing net. The facts, as disclosed by the pleadings and testimony on behalf of the plaintiff, are, in substance, that on March 28, 1898, the plaintiff and defendant had an accounting and settlement as to the balance then due plaintiff for labor and services theretofore performed for the defendant, as a result of which it was orally agreed that the defendant should, in payment of such balance, deed to the plaintiff a certain lot in Portland, of the estimated value of \$500, pay him \$100 in money upon the happening of a certain contingency, and deliver to him a fishing net, of the alleged value of \$225, at the close of the fishing season, and plaintiff agreed to receive and accept such property in full settlement thereof. On March 30 the defendant, in pursuance of this agreement, conveyed to the plaintiff, by warranty deed, the lot referred to, and received a receipt, of which the following is a copy:

“Portland, Or., March 30, 1898.

“Received of Peter Covacevich warranty deed to lot of 50x100 feet on Division and Thirty-second streets, the said conveyance being in full payment of all labor and services rendered by me for the said Covacevich, with the understanding that I am to receive an additional one hundred dollars when the remainder of the four (4) acre tract owned by the said Covacevich on Division Street is sold.

“[Signed] MARK MILOS.

“Witness:

“J. E. D. SMITH.”

The defendant refused to deliver the net, and this action was brought to recover its value. At the close of plaintiff's testimony the defendant moved for a nonsuit on the ground that the contract was within the statute of frauds, and void. The motion was overruled, and plaintiff had judgment, from which the defendant appeals.

REVERSED.

For appellant there was a brief over the names of *James Thorburn Ross*, *Wm. Ambrose Munly*, *Ephraim Baynard Seabrook*, and *John Kosciusko Kollock*, with an oral argument by *Mr. Munly*.

For respondent there was a brief over the name of *Davis, Gantenbein & Veazie*, with an oral argument by *Mr. Arthur Lyle Veazie*.

MR. CHIEF JUSTICE BEAN, after making the foregoing statement of the facts, delivered the opinion of the court.

1. The agreement of the defendant to deliver the fishing net to the plaintiff in part payment of the balance due him for services was a contract for the sale of personal property within the statute of frauds, and void, unless the agreement of the plaintiff to accept the same in part payment and satisfaction of his indebtedness is to be deemed a payment within the meaning of the statute. Section 785, Hill's Ann. Laws, provides that an agreement for the sale of personal property at a price not less than \$50, unless the buyer accept and receive some part of such property, or pay at the time some part of the purchase money, is void, unless the same, or some note or memorandum thereof, expressing the consideration, be in writing, and subscribed by the party to be charged. It is quite well settled that an oral argument to deliver goods exceeding \$50 in value in payment of an antecedent debt is within such statute, and the mere oral agreement of the creditor that the goods shall go in settlement of the debt is not sufficient to satisfy its requirement. Unless the contract is in writing, the statute requires something more than mere words, however carefully they may be considered. There must be acts which, in the nature of things, are less open to misconstruction and misunderstanding. If payment is relied on, it must be made in money or property, or in the actual discharge, in whole or in part, of some antecedent debt. A mere agreement to apply the purchase money on the debt will not suffice, because the contract would still rest in words, and nothing more. There must be an actual cancellation and discharge of the indebtedness on the books of the creditor, or a written receipt executed by him, or some other like unequivocal act, not resting in mere words, which will bind him, and put it

into the power of the debtor to enforce the contract: *Matthiessen Refining Co. v. McMahon's Adm'r*, 38 N. J. Law, 536, is a good illustration of the rule. The contract there under consideration was an agreement by the defendant to sell to the plaintiff certain goods in payment of his indebtedness, the property in them to pass to the purchaser immediately. No note or memorandum of the contract was made or signed, but it was contended that the requirements of the statute of frauds had been complied with by payment of the contract price. As stated by the court, the question presented for decision was "whether an agreement in parol by the seller to sell and the buyer to buy goods to the value of an existing debt, and thereby satisfy and pay the debt, is a valid sale within the statute, though there be no delivery of the goods, and no receipt or voucher be given as evidence of the discharge of the indebtedness." After a reference to the authorities, and especially to *Walker v. Nussey*, 16 Mees. & W. 302, which it is said has been adopted without dissent in the text-books (Benjamin, Sales, 139; Story, Sales, § 273a; 1 Chitty, Cont. 564; 3 Parsons, Cont. 52), the court, speaking through Mr. Justice DEPUE, says: "The principle which underlies the cases cited, and on which they rest, is that where no written evidence of the contract is made, and payment is relied on as the compliance with the statute, mere words are not sufficient. Some act in part performance or part execution of the contract, such as the surrender or cancellation of the evidence of the debt, or a receipt or discharge of the indebtedness, is necessary to make the contract valid." To the same effect, see 1 Reed, St. Frauds, § 231; Browne, St. Frauds (4 ed.), § 342a; *Brabin v. Hyde*, 32 N. Y. 519; *Gorman v. Brossard*, 120 Mich. 611 (79 N. W. 903); *Norwegian Plow Co. v. Hanthorn*, 71 Wis. 529 (37 N. W. 825).

This doctrine is admitted by the plaintiff, but his contention is that the receipt executed by him two days after the alleged agreement was a sufficient payment to take the cause out of the statute. The statute requires the payment to be made at the time of the agreement, and it is doubtful whether

a subsequent payment will suffice, unless it is made for the express purpose of complying with the statute, or at a time when the parties substantially restated or reaffirmed the terms of the contract: 1 Reed, St. Frauds, §§ 226, 227.

2. But, however this may be, if the receipt is to be considered as evidence of the contract for any purpose, it seems to us there is no evading the conclusion that it must be held to embody all the terms thereof. A mere receipt is always open to explanation, and may be varied by parol, because it is simply an admission or declaration in writing; but, where it also embodies the elements of a contract, the latter is subject to the same rules as any other contract: 19 Am. & Eng. Ency. Law (1 ed.), 1123, and notes; *Conant v. Kimball's Estate*, 95 Wis. 550 (70 N. W. 74); *Jackson v. Ely*, 57 Ohio St. 450 (49 N. E. 792); *James v. Bligh*, 11 Allen, 4; *Egleston v. Knickerbacker*, 6 Barb. 458; *Coon v. Knap*, 8 N. Y. 402 (59 Am. Dec. 502); *Goodwin v. Goodwin*, 59 N. H. 548. By the writing in question, binding on the plaintiff by his signature and on the defendant by its acceptance, it is, in effect, agreed that the execution and delivery of the deed and the subsequent payment of the \$100 is a full satisfaction and discharge of the defendant's indebtedness. To permit the plaintiff to show by parol that he was to receive the fishing net in addition to the items specified in the writing would, it seems to us, clearly be permission to add to or vary the writing, and therefore incompetent. From these views it follows that, if the case is to be considered independently of the writing, on the theory that it was not intended to express the terms of the contract, the plaintiff must fail because of the statute of frauds. If, on the other hand, the writing is to be deemed evidence of the contract for one purpose, it must be for all, and he must fail because of the incompetency of evidence to vary or contradict the writing.

In either view, the judgment must be reversed, and it is so ordered.

REVERSED.

Argued 10 December ; decided 23 December, 1901.

MONTGOMERY v. SHAVER.

[66 Pac. 923.]

NAVIGABLE WATERS—WHARF RIGHTS.

1. Riparian owners on navigable streams are entitled to wharf from their upland out to navigable water, or to the channel, within side lines drawn at right angles with the thread of the stream and intersecting the boundary lines of the land at ordinary high-water mark, and not elsewhere; and the right is not affected at all by the establishment of wharf lines.

MUNICIPAL CONTROL OF WHARF RIGHTS.

2. Section 4228 of Hill's Ann. Laws, providing that the corporate authorities of a town wherein it is proposed to erect a wharf or wharves may prescribe the mode and extent to which the franchise may be exercised beyond the line of low-water mark, confers power to regulate the manner of building wharves, and to establish wharf lines, but does not empower a municipality to authorize a riparian owner to extend his wharf in front of the lands of an adjoining riparian owner.

LIMITATIONS—ADVERSE POSSESSION.

3. Where the complaint in an injunction suit to restrain defendant from occupying certain premises is amended to include a larger tract, the suit will be deemed to have been commenced on the day of the amendment, in determining whether defendant had acquired title by adverse possession to the portion of the tract not included in the original complaint.

NATURE OF WHARF PRIVILEGE.

4. A wharf right is an appurtenance to the upland with which it is connected; it is not a right inseparably attached, however, but may be severed from the upland.

EFFECT OF ADVERSE HOLDING OF WHARF RIGHT.

5. A wharf right may be lost to the upland owner by prescription, so that a riparian owner erecting and using a wharf for ten years, which encroaches on the water front of an adjacent riparian owner, acquires title by adverse possession of the water front so occupied and to the waters extending outward to the ship channel in front of the water front so occupied.

EVIDENCE OF ADVERSE POSSESSION OF WHARF RIGHT.

6. A riparian owner claiming title by adverse possession of the water front of an adjoining riparian owner had driven piling for the purpose of constructing a wharf, but it was never completed. He afterwards authorized the use of a portion of the space as a ferry slip, and it was so used for about six months, and boats were occasionally tied up to the piling. *Held*, not to show an exclusive use sufficient to give title by adverse possession.

REQUIREMENT OF CLAIM BY PRESCRIPTION.

7. A person claiming title by prescription to the water front appurtenant to the land of a riparian owner must show an ouster and an actual possession under a claim of right for the statutory period, and it is immaterial whether the riparian owner was in actual possession of the water front during such time, since possession follows the true title.

From Multnomah: ALFRED F. SEARS, JR., Judge.

This is an injunction suit originally commenced by James B. Montgomery against Geo. W. Shaver and others. Mary Phelps Montgomery, as executrix, was substituted as plaintiff, and a decree entered in her favor, from which defendants Shaver and Ryan appeal. MODIFIED.

For appellants there was a brief and an oral argument by *Mr. Julius C. Moreland*.

For respondent there was a brief over the names of *Stott & Stout*, and *Mitchell & Tanner*, with an oral argument by *Messrs. Geo. C. Stout*, and *Albert H. Tanner*.

MR. JUSTICE WOLVERTON delivered the opinion.

The north line of the Irving claim, which is also the dividing line between the former cities of East Portland and Albina, intersects the Willamette River obliquely, forming an acute angle therewith on the south. Plaintiff's testator was, at the institution of this suit, the owner of the land lying immediately north of this line and extending to the river, and the defendants of that adjoining it on the south. In 1881, Shaver constructed a wharf westerly from the northwest corner of defendants' upland, extending to the wharf line, as then established, and in 1882 attempted to extend it northward along said wharf line to the north line of the Irving claim if extended into the river. While engaged in driving the piling as a substructure therefor, the plaintiff's testator, on November 28 of that year, began a suit to enjoin the further prosecution of the work, claiming that the space to be occupied by the proposed extension was in front of his property, and that the right of wharfage, as to such space, belonged to him. The complaint described the realty of which he was the owner as beginning at the easterly corner of river lot 19 in the Town of Albina; thence easterly along the southerly line of River Street four hundred and twenty-five feet, to the boundary line

of East Portland; thence westerly along said boundary line to ordinary low-water mark on the bank of the Willamette River; thence northwesterly meandering the river, etc., to the place of the beginning; and alleged that by the laws of Oregon the plaintiff was the owner and entitled to the overflowed lands lying between the above-described lands where they are bounded on the westerly side by low-water mark and the navigable channel of said river, and that as riparian proprietor he is entitled to have access to said river from every portion of said lands abutting thereon. After the issues had been formulated, a trial was had, resulting in a decree enjoining defendants from proceeding further with the construction of said wharf, which decree was, on August 14, 1883, set aside and vacated, and no further proceedings were had until March 6, 1893, when plaintiff filed, by leave of the court, an amended complaint. In this latter pleading plaintiff describes his realty by metes and bounds in all respects as before, except that it extends westerly to ordinary high-water instead of low-water mark on the bank of the river, and claiming the wharfage right in front thereof. In the meantime nothing had been done towards the further construction of the wharf. The decree upon the second trial having awarded in the main the relief demanded by the complaint, the defendants Shaver and Ryan appeal.

1. The plaintiff claims that by reason of her ownership of the uplands she is entitled to the right or privilege of constructing a wharf or wharves in front thereof, and that, as between her and the defendants, their respective rights must be determined by a line commencing on the bank of the river at ordinary high-water mark at the point where the dividing line of plaintiff's and defendants' upland intersects the same, and extending thence to the thread of the stream at right angles therewith. The right to wharf out to the navigable water of a stream is given by statute to any owner of land within the corporate limits of any town or city bordering thereon: Hill's Ann. Laws, § 4227. It must be conceded that wharfage or wharfing privileges are valueless unless they extend to naviga-

ble water or the ships channel. It often happens that the contour or configuration of a stream is such that, if the dividing line of upland owners bordering on the margin or line of high-water mark is extended by right lines the owner on one side thereof will be deprived of access to the ships channel; so that, in order to accord to each shore owner a ratable and equitable proportion of the navigable stream, the rule has been firmly established, as being the most apt and appropriate for the purpose, that the bounds are to be governed by lines drawn at right angles from the thread of the stream to the shore termini. The fact that the proper authorities have established a wharf line in front does not alter the case. The thread of the stream is the unalterable base from which lines drawn at right angles to the shore termini will determine the area subject to the exercise of the wharfing privilege: 4 Am. & Eng. Ency. Law (2 ed.), 828; *Bay City Gaslight Co. v. Industrial Works*, 28 Mich. 182; *Clark v. Campau*, 19 Mich. 325; *Jones v. Johnston*, 59 U. S. (18 How.) 150; *Emerson v. Taylor*, 9 Me. 42 (23 Am. Dec. 531); *Knight v. Wilder*, 2 Cush. 199 (48 Am. Dec. 660). There are possibly exceptions to the rule, but this is clearly not a case falling within any that have been called to our attention.

It is suggested that the shore owner of uplands takes to low-water instead of ordinary high-water mark, but the rule to the contrary has been so firmly established in this jurisdiction that it is unnecessary to treat the question further than to cite the cases in which it was involved: *Parker v. Taylor*, 7 Or. 435; *Wilson v. Welch*, 12 Or. 353 (7 Pac. 341); *Johnson v. Knott*, 13 Or. 308 (10 Pac. 418); *Bowlby v. Shively*, 22 Or. 410 (30 Pac. 154); *Astoria Exchange Co. v. Shively*, 27 Or. 104 (39 Pac. 398, 40 Pac. 92); *Shively v. Bowlby*, 152 U. S. 1 (14 Sup. Ct. 548).

2. The next zealous contention is that defendants were authorized by competent authority to construct their wharves over the disputed territory. This is based upon the provisions of Hill's Ann. Laws, § 4228, and Ordinance 359, adopted by the Common Council of the City of East Portland February

5, 1883. The section alluded to provides that the corporate authorities of the town wherein it is proposed to construct a wharf or wharves shall have power to regulate the privilege or franchise granted by the preceding section, and that such authorities may prescribe the mode and extent to which the franchise may be exercised beyond the line of low-water mark, so that such wharf or wharves shall not be constructed any further into the stream than may be necessary and convenient, and so as not to unnecessarily interfere with navigation. Section 4227 is said to be a permissive statute, which alludes to certain things that may be done, but does not vest any right until exercised. It constitutes a license revocable at the pleasure of the legislature until acted upon: *Bowlby v. Shively*, 22 Or. 410 (30 Pac. 154); *Lewis v. City of Portland*, 25 Or. 133, 136 (35 Pac. 256, 22 L. R. A. 736, 42 Am. St. Rep. 772). The statute is, however, declarative of the right or privilege which existed at common law, the exercise of which might be regulated by statute; but so long as it was not prohibited it existed as a private right derived from the passive or implied license by the public: Gould, Waters, § 176. So that the enactment of Section 4227 gave positive authority where it previously existed passively and by implication. Now, the purpose of Section 4228 was to regulate the building of wharves, not to extend the right or license as recognized and granted by the previous section, in front of other lands than that of the owner desiring to exercise his privilege. The regulation pertains to the manner of erecting structures, and the extent to which they shall be built out into the channel of the stream, so as not to obstruct or impede navigation; and it is upon authority of said section that wharf lines are established, beyond which no wharfing privileges may be exercised: *Lewis v. City of Portland*, 25 Or. 133 (22 L. R. A. 736, 42 Am. St. Rep. 772, 35 Pac. 256). In this view the common council of East Portland was without authority to authorize defendants to construct any wharf or dock beyond the space in front of their own upland, measured by lines drawn at right angles with the thread of the stream to their shore termini.

At this juncture a question of fact is presented pertaining to the location upon the ground of the point where the dividing line between the upland of plaintiff and defendants intersects the ordinary high-water mark on the bank of the river, because upon its definite location depends the extent of their relative primary wharfing rights or privileges. The point of ordinary high water is defined by Mr. Justice THAYER in *Johnson v. Knott*, 13 Or. 308 (10 Pac. 418) as that "to which the water usually rises in an ordinary season of high water." Upon this question the circuit court found that "The said high-water mark on the boundary line between the said Town of Albina, Oregon, and the City of East Portland, is at a point where the northern boundary line of the Shaver dock extended easterly in a direct line, intersects said boundary line between the said Town of Albina, Oregon, and said City of East Portland, being at the point marked 'X. F.' on the map introduced in evidence in this cause, marked 'Defendants Ex. 1.''" This finding is supported by the testimony adduced, and probably accords as nearly with the fact of the exact location as it is possible to determine. Witnesses whose familiarity with the premises would enable them to know have so designated the point, and it appears to conform very nearly, if not exactly, to the original claim location of the northwest corner of the Irving donation, which ordinarily would be sufficient for its satisfactory establishment. But what lends peculiar weight to the finding is that the learned trial judge visited the *locus in quo* by consent of the parties, and located the point upon the ground. Under such circumstances the case to the contrary should be a clear one to warrant this court in locating it elsewhere, and manifestly such a case is not presented by the record.

3. The last question relates to the statute of limitations, the defendants claiming that they have been in the adverse possession, use, and enjoyment of the right or privilege of wharfing out to navigable water, as it pertains to the disputed territory, for more than ten years prior to the filing of the amended complaint, and hence that plaintiff is precluded from prosecuting a suit to enjoin their further occupancy and use.

The original complaint, by reason of the manner in which it was drafted, did not comprise within its purview the whole of the disputed territory, although it was probably so intended, but only so much as was opposite plaintiff's land with the northern boundary of the Irving claim extended to low-water mark. The amended complaint, filed March 6, 1893, brought the whole into litigation for the first time, so that as to the territory latterly brought into the controversy the suit must be deemed as having been commenced as of that date: *Buntin v. Chicago R. I. & P. Co.* (C. C.) 41 Fed. 744; *Alabama Gt. So. R. Co. v. Smith*, 81 Ala. 229 (1 South. 723; *Miller v. McIntyre*, 31 U. S. (6 Pet.) 61; *Sicard v. Davis*, 31 U. S. (6 Pet.) 124; *Holmes v. Trout*, 32 U. S. (7 Pet.) 171; *Bigham v. Talbot*, 63 Tex. 271; *Gill v. Young*, 88 N. C. 58.

4. The right or privilege of constructing a wharf or wharves, which the statute accords, and that which existed before the statute, is a right appurtenant to the upland. It is not personal to the shore owner, so that it must be exercised by him alone or not at all, but is the subject of grant, and may be severed from the upland. See *Parker v. West Coast Pack. Co.* 17 Or. 510 (21 Pac. 822, 5 L. R. A. 61); *Andrus v. Knott*, 12 Or. 501 (8 Pac. 763); *Parker v. Taylor*, 7 Or. 435; *Bowlby v. Shively*, 22 Or. 410; *Lewis v. City of Portland*, 25 Or. 133, 136 (35 Pac. 256, 22 L. R. A. 736, 42 Am. St. Rep. 772); *Welch v. Oregon Ry. & Nav. Co.* 34 Or. 447 (56 Pac. 417).

5. Such being its nature, it may be lost to the upland owner by prescription, so that, if the defendants have been in the adverse possession and enjoyment of the franchise, as it respects the disputed territory or any portion thereof, for more than ten years, plaintiff is barred of her remedy to the extent of such adverse holding: *Sargent v. Ballard*, 9 Pick. 251; *Gray v. Bartlett*, 20 Pick. 186 (32 Am. Dec. 208). Shaver's wharf was constructed in 1881, so that there is no question but that defendants had been in the exclusive and adverse possession thereof, and the space occupied thereby, for the statutory period, prior to the filing of the amended complaint. When first erected, the structure extended to the wharf line as

then established. Subsequently the line was changed, and established further out in the stream. The northerly end of the wharf extends a few feet upon the disputed territory, and as to the extension the circuit court decreed that the statute of limitations barred the plaintiff's suit, limiting the bar to the space actually covered by the structure. But adverse possession of the water front for wharfage purposes carries the occupancy to deep water or the ships channel, for of what use is the wharf unless water craft can approach and use it? So that defendant's adverse holding by reason of the structure extends to deep water at right angles with the thread of the stream.

6. As it relates to the remaining space, the defendants drove some piling therein, extending out to the old wharf line, early in 1882, but have done nothing further in the way of completing the structure to the present time. Part of the space was once used as a ferry slip, upon the authority of the defendants, for about six months, and boats have occasionally tied up to the piling, but otherwise there has been no occupancy or user by the defendants. This comes far short of use to the exclusion of plaintiff or adverse possession.

7. It is said that plaintiff has not been in actual possession in the meanwhile, but possession follows the true title unless held adversely thereto, and defendants must show an ouster, and exclusive and actual possession thereof under claim of right, until the statute has run its course and has given a new title.

In view of these conclusions the decree of the court below will be modified, and the defendants enjoined from the use or occupancy of any part of the disputed territory lying north of a line commencing at the point where the north line of their wharf, as now constructed, if extended, intersects the north line of the Irving claim, and running thence westerly to the northwest corner of said wharf, and thence westerly to the thread of the stream at right angles therewith. The costs and disbursements will be awarded to the plaintiff in the court below and to the defendants in this court. MODIFIED.

Decided 16 December, 1901; rehearing denied 10 March, 1902.

RICHARDSON v. ORTH.

[66 Pac. 925; 69 Pac. 455.]

WILL—CONTRACT—MUTUALITY.

1. A writing reciting that the maker, being in sound mind, "declare this to be my last will; that is, * * * I give J. the rest of my property,"—does not constitute a contract between the parties, no obligation being assumed by either, and may be revoked by the maker.

WILL—SUFFICIENCY OF ATTESTATION.

2. The signature at the end of a purported will by witnesses will not constitute a sufficient attestation thereof when the testatrix does not indicate to them in any way what the paper is, or acknowledge that she has signed it, or that it was intended to be executed by her, the paper being so folded that the witnesses could not see any of the writing.

REQUISITES OF CONTRACT TO DEVISE—SPECIFIC PERFORMANCE.

3. In cases to enforce specific performances of an agreement to will property the evidence must show the contract to be definite, mutual, and founded upon an adequate consideration, and the proof must be clear and convincing: *Rose v. Oliver*, 32 Or. 447, cited.

CONTRACT TO DEVISE—SUFFICIENCY OF EVIDENCE.

4. The evidence in this case lacks the convincing quality that is necessary to establish a contract to devise property: *Rose v. Oliver*, 32 Or. 447, cited.

CONTRACT TO DEVISE—SUFFICIENCY OF CONSIDERATION.

5. An agreement whereby decedent was to will her estate (which amounted to about \$4,000) to her stepdaughter, in consideration that the latter would live with decedent and her husband and care for the husband during his illness, is not supported by sufficient consideration to warrant specific performance, where the daughter actually cared for her father only a month, when she was relieved from her duties by his removal to other quarters, and she continued her regular occupation during the entire period.

CONTRACT TO DEVISE—STATUTE OF FRAUDS—PART PERFORMANCE.*

6. A parol agreement whereby decedent was to will her estate to her stepdaughter in consideration that the latter would live with the mother

*NOTE.—The following annotated cases bear on the validity of agreements to give or bequeath property to a stated person at the promisor's death: *Van Tine v. Van Tine*, 1 L. R. A. 155; *Carmichael v. Carmichael*, 1 L. R. A. 596, 16 Am. St. Rep. 528, *Krell v. Codman*, 14 L. R. A. 860, with note, *Agreement to Give Property After Death of Promisor*, 26 Am. St. Rep. 260; *Wright v. Wright*, 23 L. R. A. 196 (with briefs); *Nowack v. Berger*, 31 L. R. A. 810, 54 Am. St. Rep. 663; *Kofa v. Rosicky*, 43 Am. St. Rep. 685, 25 L. R. A. 207 (with briefs); *Owens v. McNally*, 33 L. R. A. 369 (with briefs); *Svanburg v. Fossen*, 74 Am. St. Rep. 490, 43 L. R. A. 427 (with briefs);

and her husband and would care for the husband during his illness, is not taken out of the statute of frauds by part performance by the daughter, where it appeared that she cared for her father for only a month, and that she continued her regular occupation during the entire time.

REASONABLE TIME FOR FILING COST BILL.

7. Cost bills should be filed in the supreme court within a reasonable time after the decision of the case, but under Rules 20, 21, and 22, providing a certain time within which parties may apply for a rehearing, and that the mandate shall not be issued until such application is disposed of, it may sometimes be that the balance of the term at which the case was decided will not be "a reasonable time" for filing the cost bill, as in this case: *State v. Munds*, 7 Or. 80, distinguished.

COMPLETION OF RECORDS BEFORE ISSUING MANDATE.

8. Rule 22 of this court, providing that, within sixty days after disposition of an appeal or petition for rehearing, a mandate shall issue as of course on the application of either party, does not preclude the clerk, on application being made, from filling in blanks left for the amount of costs and disbursements.

From Multnomah: JOHN B. CLELAND, Judge.

Suit by Julia C. Richardson against Bertrand Orth and others to specifically enforce a contract to will property. Decree passed for defendants, from which plaintiff appeals.

AFFIRMED.

For plaintiff there was a brief over the name of *Watson & Beekman*, with an oral argument by *Mr. Edw. B. Watson*.

For respondents there was a brief over the names of *O'Neill & Thompson*, and *Pipes & Tift*, with an oral argument by *Messrs. Mark O'Neill*, and *Arthur P. Tift*.

Quinn v. Quinn 49 Am. St. Rep. 875; *Bryson v. McShane*, 49 L. R. A. 527; *Burns v. Smith*, 69 Am. St. Rep. 653.

Whether a performance by the promisee of a contract to bequeath or devise property is sufficient to take the case out of the requirement of the statute of limitations is considered in the following cases:

Pond v. Sheean, 8 L. R. A. 414, with note; note to *Krell v. Codman*, 14 L. R. A. at p. 863; *Ellis v. Cary*, 17 Am. St. Rep. 125, 4 L. R. A. 55; *Shahan v. Sican*, 29 Am. St. Rep. 517; *Nowack v. Berger*, 31 L. R. A. 810, 54 Am. St. Rep. 663; *Sicash v. Sharpstein*, 32 L. R. A. 796; *Grant v. Grant*, 38 Am. St. Rep. 379; *Quinn v. Quinn*, 49 Am. St. Rep. 875; *Dicken v. McKinley*, 54 Am. St. Rep. 472; *Turpinseed v. Strrine*, 76 Am. St. Rep. 580.—REPORTER.

MR. JUSTICE WOLVERTON delivered the opinion.

This is a suit to enforce the specific performance of an alleged contract by and between Eleanor Richardson, now deceased, and the plaintiff, whereby the former undertook and agreed, in consideration of certain services to be rendered, to make and declare her last will and testament in favor of the plaintiff, thereby bequeathing and devising to plaintiff the whole of her estate. In May, 1877, A. B. Richardson and Eleanor Richardson, husband and wife, conveyed certain real property to F. N. Blanchet, in trust, however, for the sole use and benefit of Eleanor. Subsequently, two parcels of the realty were sold, and the proceeds, among which was a note and mortgage executed by John L. George to William H. Gross, Roman Catholic Archbishop of the Diocese of Oregon, the successor of Blanchet, so that in 1898 Eleanor's estate consisted of what remained of such proceeds—the west seventy-five feet of lot 8 in block 156 of the City of Portland, and some household furniture and wearing apparel. After reciting the foregoing facts, and others not necessary to mention, the complaint states, in substance, that on October 8, 1898, Richardson and wife being sick and infirm, the said Eleanor proposed and offered the plaintiff that if she would give up her music room and lodging at 167 Eleventh Street, in the City of Portland, and remove to her home temporarily, so as to be near her husband during his illness, and would employ her time and services whenever needed in caring for and comforting him during such illness and in attending on, caring for, and comforting her, the said Eleanor, during her apprehended illness, and in advising and assisting her in the management of her property and business affairs, she, the said Eleanor, in consideration thereof, would, by her last will, duly bequeath and devise to plaintiff all property, both real, personal, and mixed, belonging to her at the time of her death, after providing for her husband's needs and the payment of her lawful debts; that plaintiff then and there accepted said offer and proposition, and promised and agreed to and with the said Eleanor to comply with and fulfill all the terms and conditions thereof; that

the said Eleanor, then and there intending to comply with and perform said agreement, wrote out with her own hand, and caused to be attested and delivered to plaintiff, her last will and testament, in words as follows: "I, Eleanor Richardson, being sound in mind and memory, declare this to be my last will; that is, after my lawful debts are paid, and after my husband, A. B. Richardson, is provided for, I give to Julia Richardson the rest of my property. October 8, 1898. Witness: Mrs. W. A. Pittenger, W. A. Pittenger," and as a part of the same transaction wrote, executed, and caused to be attested and delivered to plaintiff two orders—one upon the Society of the Holy Names of Jesus and Mary, and the other upon Mr. George—authorizing plaintiff, in case of the illness of said Eleanor, to draw what money was necessary therefor; that plaintiff received and accepted the first instrument as and for the last will and testament of Eleanor, and retained the same, together with the orders, until the time of her death, May 27, 1899, with her full acquiescence, knowledge, and consent. Performance on the part of the plaintiff is then alleged, following which it is stated that on February 20, after the death of Richardson, the plaintiff having been advised that the signature of said Eleanor to the first named instrument was requisite to its validity, so informed her, whereupon she willingly subscribed the same. The alleged contract or agreement is controverted by the answer, and for a further defense, among others, it is averred that the consideration to support it is grossly inadequate.

Several questions are presented by the record, but, in view of the conclusion we have reached, it is unnecessary to discuss more than one feature of the controversy, and that is whether there was a valid and binding agreement made and entered into by and between the plaintiff and Eleanor Richardson, whereby the latter undertook and promised to will and bequeath her property to the former; and whether, if made, it is supported by a sufficient and adequate consideration. The case rests mainly upon the plaintiff's own testimony, she being the only witness who has attempted to state the terms and conditions

of the alleged contract and agreement, and what was done by the parties concerned in pursuance thereof. However, before proceeding to any resume or discussion of her testimony, there are certain uncontroverted facts that need be stated. Plaintiff is the daughter of Richardson, and stepdaughter and niece of Eleanor, his wife. The father and stepmother had resided together upon the realty above described since 1877, but plaintiff had not lived with them for more than fourteen years. About the nineteenth of January, 1898, Richardson was taken sick, having been affected with paralysis, whereupon Mrs. Richardson sent for Mrs. Mattingly, a sister of plaintiff, and upon her advice he was taken to the hospital, where he remained for three weeks. From there he was taken to Mrs. Mattingly's, who attended upon and cared for him until about the last days of September, when he was removed to his home, where he remained until late in October, or early in November, when, at the instance of Mrs. Richardson, he was again taken to Mrs. Mattingly's, where he was attended and cared for by her until the time of his death, February 9, 1899. Mrs. Richardson died May 27 following, at St. Vincent's Hospital. About the time Richardson was taken home, plaintiff went to the house at the request of Mrs. Richardson. Plaintiff testifies that from said time until the eighth of October she helped her father and kept house; that on the eighth her mother wrote with her own hand the document set out in the complaint, purporting to be her last will and testament, but without signing or subscribing it; that she requested Mr. and Mrs. Pittenger to witness it, who, without seeing the writing, the paper being folded in such a manner as to obscure it from view, and without knowledge of its contents, or being informed as to what it was, signed their names as witnesses; that subsequently, on February 30, 1899, after the death of Richardson, she subscribed it, her attention having been by plaintiff called to the fact that it was not signed, and that its validity was dependent thereon, but not in the presence of the attesting witnesses. At the time of the writing of the purported will Mrs. Richardson wrote two orders,—one directed to the Society of the Sis-

ters of the Holy Names of Jesus and Mary, and the other to Mr. George,—authorizing the plaintiff, in case of her illness, to draw whatever money was necessary for her purposes. The last two writings were signed by Mrs. Richardson and witnessed by Mr. and Mrs. Pittenger. Mrs. Richardson, her husband, and plaintiff were all present at the time. It may be stated in this connection that the Richardsons were occupying the upper or second story of the house, and the Pittengers the lower story, having rented the same from Mrs. Richardson. The Pittengers moved out about the twelfth or thirteenth of October, some four or five days after attesting the writings.

The plaintiff, being asked how these papers came to be made, testifies: “I was up there with my stepmother. I decided to go over there, and live with her. She wanted me to be up there when papa came. She said that she had some one who was going to help her. So I went over, and there wasn’t any one there, and she asked me if I would stay all night. I said certainly I would stay until she could get some one, and I did not have any idea of going up there to stay. Several days went by, and I was busy around helping them, and my stepmother said she would like to have me come and make my home with papa and her. I said, of course, to do that I would have to give up my own business and the rooms I occupied, and I said I would have to be protected in some way if I did that; and she said she would make over this property to me, and that at the time she died everything would be mine, and she explained this to me, and she said that she had this money at the Sisters, and this note of Mr. George’s, and in case she got ill she would draw me out an order on both these places, which she did; and then she made out this will, and gave it to me in consideration that I would come up and make my home there; and right then and there she wrote these papers out, and I asked her if she hadn’t better have a lawyer, and she said she knew how to do it herself; and I showed it to father, and he said it was all right. In a general way I was to be up there with them, and attend to papa and herself. She didn’t intend

me to come up and do the work, but I did it until she could get some one else, and I was to do and help around, and see after them generally.” Continuing, she states, in effect, that she did as she agreed,—moved up and made her home there in consequence of her mother making over the property; that she accepted the proposition, and felt that she could, because she knew that her mother had enough to take care of them while she was there, and, if anything should happen, she would have the writing to protect her, as she had given up her business; that she had lodging and music rooms elsewhere, which were given up after that; that she taught music at her mother’s, but neglected it a great deal,—just attended to it as she could without neglecting her father and the house,—that being her understanding of the arrangement; that she looked after her father, helped him up and down stairs, looked after the meals and the property generally; that, as to her mother’s business, she attended to the rent and bills for household expenditures; that her mother consulted her about everything that was going on; that nearly all of her time was taken up with the care of her father and mother and in attending to her mother’s business; that her father remained there at the house to the very last of October or the first of November, not a whole month, when he was taken to her sister’s; that after that plaintiff did not remain or live with her mother, but took rooms elsewhere with a friend; that she was to and fro visiting her mother every little while, possibly once or twice a week, until she became ill; that she did not have the further care of her father, but visited him frequently, the arrangement with her mother being, at the time her father went back to Mrs. Mattingly’s, in regard thereto, that she should go to and fro and keep her posted as to how he was; that her mother became ill about Christmas, after which she did not leave her house; that she wanted “a nurse or some one to look after her,” and plaintiff went around to find a suitable person; that several persons attended her during her sickness; that plaintiff did not attend her, but visited her, as before stated, and went on errands, and did some business for her; that she was ready to

go at all times requested, and that nearly every day she would have something to do for her.

On cross-examination she testified, in substance, that the week or ten days that she was at her mother's before the eighth of October she did everything that was necessary about the house, prepared their meals, and looked after the house; that she went there because her father was coming home, and her mother wanted her to be at the house when he came; that she was very willing to go, but did not with the expectation of staying; that she had no piano of her own, but was using one that belonged to a friend, and that when she went to her mother's she used hers. Continuing, she testified as interrogated: "Q. You say your stepmother proposed to have you stay there and work for her, and do the cooking? A. No, I don't know as she wanted me to go there and do the work, but to look after things generally, and she intended to get some one else to do the work; but at the time she hadn't any one, and I did it until she was able to get some one. Q. Your agreement with her, then, was not to do the housework? A. No, not to do the housework itself. Q. You made the agreement, if she would give you all the property, you would go there and look after things generally? A. Yes, look after things generally, and my father. Q. But not to do the housework? A. No, not especially the housework. Q. What business did your stepmother have besides the housework? A. She wasn't able to look after my father. Q. Nursing? A. He had to be assisted with his dressing and with his meals. Papa was paralyzed, and had to be helped, fed, and taken out walking, and attended off and on. Q. I asked you if the agreement was that you were to take care of him. A. Yes, and look after whatever was to be done, but not to do the housework itself. Q. Was it included in that agreement that you were to nurse him? A. Yes. Q. And assist him in putting on his clothes and caring for him? A. Yes. Q. Were you to work for her in any way besides that? A. Well, if she wanted anything done,—like attending to her bills, or having her business attended to,—she expected me to do that. Q. Did she tell you that she expected you to do that?

A. She didn't specify particularly, but the understanding was that in a general way I was to look after the house. Q. When did you make this agreement? A. On the eighth of October, at the time of this writing. Q. Was that the first time this matter was mentioned? A. Yes, that it was mentioned so seriously. Q. The first time you had a conversation about it was on the day of this writing? A. Yes. Q. Who proposed it,—you or she? A. She proposed I make my home with her. Q. Did she propose you do that for a consideration? A. Not exactly in those words. She said, 'I would like to have you come and make your home with papa and me.' I said: 'If I do that, I will have to neglect my own business. Of course, I am dependent on it for my living. If I do, you will have to protect me.' She says, 'Whatever you want me to do I will do.' I says, 'You have property and money. If during the time I am with you you should take sick yourself, you might get into a condition that you couldn't tell me where any money was. You want to fix it so I will be protected if I give up this, and come here to live.' Q. Is that the word you used? A. That is the very word I used. Q. You didn't say you would go if she gave you all the property? A. That is what I meant. I told her I would give up this teaching, not exactly give it up, but only give it up as far as it was necessary in looking after the house and papa and herself. Q. You say that payment of the grocery bills and signing the receipts for the rent was not particularly mentioned in the agreement? A. Well, I had been doing those things in a general way, and that is what I understood she meant. Q. Did she mention that particularly? A. No, I don't think she did; but I understood that was what she meant. Q. Did she mention particularly the care and nursing of your father as one of the things to do? A. Yes. I cannot remember her exact words, but that was one of the things talked about,—look after papa and her and the affairs of the house, but not to do the housework. That was the understanding. Q. And you were still to be permitted to pursue your music teaching in so far as it didn't interfere with the agreement? A. Yes."

She further states that she had not visited her parents for fourteen or fifteen years previous to the time of her father's sickness; that she was on good terms with her father, but did not fancy her mother; that the reason that he went back to her sister's was that her mother was under the impression that it was too confining in the upper part of the house; that she was very much afraid—and so was the plaintiff—that he would get injured going up and down stairs, and they thought it would be best for him to go back; that after that plaintiff had nothing to do with the caring for her father; that she looked after him less than a month; that she did not nurse her step-mother at all; that she bought things for her, and saw that she was attended to; that in November and December and subsequently she had a room with a friend of hers, and attended to her music teaching; that she did not do anything else, except to step in occasionally and visit her father, and go and see her mother; that after her mother was taken ill she did not go out of her room until she was taken to the hospital, about six weeks before she died; that she had a servant or nurse to take care of her, and that plaintiff called very often, but did not visit her so often after she was taken to the hospital. Near the close of her testimony, in answer to the question, "Was anything in the agreement you had with your aunt concerning it [money supposed to be in the hands of the sisters] that you were to work for her as you said?" She says: "Well, now, of course, when I went up there it was to make my home with her, as we both understood, until she died; and when the second agreement was made I thought probably that will would be affected by that change, and I asked her if it made any difference, and she said, 'None whatever.' She said, 'You can come and visit me, and those papers will be just the same.'" For the purpose of corroborating the plaintiff, two witnesses were called, and testified to having heard Mrs. Richardson say that she had turned over her property to Julia; and one of these, in effect, that Julia was to take care of her mother and father as long as the former lived. It is further shown that on October 25, 1898, Mrs. Richardson gave to M. L. Griffin, a thirty-day contract

for the sale of her realty; that on November 8 a sale was negotiated through him to E. J. Jaeger and T. H. Edwards, and that in furtherance of perfecting the title she, on March 29, executed a quitclaim deed to them, and had it deposited in escrow, to be delivered upon the payment of the consideration in manner as stipulated in the contract of sale; and on the thirteenth day of May, 1899, she entered into a written contract with the Sisters of Charity at St. Vincent's Hospital, whereby she agreed to pay them \$1,500 in consideration that they furnish her a home, board, lodging, and medicines during the term of her natural life; and on the day before she died she made a will, as alleged in the complaint, whereby she bequeathed to plaintiff but \$25.

1. The unexecuted writing subscribed by W. A. Pittenger and wife as witnesses was at the time no doubt intended by Mrs. Richardson to constitute her last will and testament. It is not a contract in any sense of the term, as witness its terms and conditions. No obligations were assumed either by the testatrix or the plaintiff, who was made the sole residuary legatee, she being the only person concerned, save the father and husband, who was to be provided for. So far as disclosed by the instrument, the testatrix had full liberty to revoke it at any time, and the plaintiff was without power or authority to prevent or restrain her, so that the writing cannot be said to be within itself a contract between the testatrix and the plaintiff.

2. Nor was it executed as a will as required by the statute: *Luper v. Werts*, 19 Or. 122 (23 Pac. 850). If the circumstance that Mrs. Richardson did not sign the writing or had not signed it at the time the witnesses subscribed it be waived, and the fact that the name Eleanor Richardson appears in the body of the will be conceded to be a sufficient signing, the evidence even then does not show a sufficient or valid attestation. True, the witnesses were requested by the testatrix to sign the paper, but she did not indicate to them in the slightest way what the paper was, or acknowledge to them that she had signed or in any manner attached her name to it, or even that

the writing was hers, or intended to be executed by her, the fact being that the paper was so folded that the witnesses could not see any of the writing, or know of its contents or purposes, or of the presence of the name of the testatrix in the body of the instrument; and this, within the doctrine of *Luper v. Werts*, 19 Or. 122 (23 Pac. 850), constitutes a wholly insufficient attestation, and the document cannot be, therefore, considered as an executed will. The other writings are not contracts, but merely orders to enable the plaintiff to draw money in case of her mother's illness. So that, whatever contract was made and entered into between plaintiff and her mother must be established by other evidence than these papers. Nor do we understand that plaintiff contends otherwise.

3. But it is strenuously insisted that these papers were executed in pursuance of the contract, and as acts in carrying out its purposes, and therefore lend support to and are corroborative of plaintiff's statement as to what the real contract was. The fact of their execution is just as consistent with the nonexistence as with the existence of such a contract or agreement, so that the oral statement is not materially aided thereby. The defendants contend that the alleged agreement is within the statute of frauds, and, not being in writing, its existence cannot be established by competent proof; but, as plaintiff depends upon such a part performance in reliance upon the agreement as will take the case out of the statute in a court of equity, we must ascertain first what verbal agreement, if any, has been established, and, if any such is found to exist, then it will be time enough to determine whether the statute cuts off the remedy. "In this class of cases," says BARRETT, J., in *Gall v. Gall*, 67 Hun, 600 (19 N. Y. Supp. 332, 333), "the ordinary rules which govern in actions to compel the specific performance of contracts, and which furnish reasonable safeguards against frauds, should be rigidly applied. These rules require that the contract be certain and definite in all its parts; that it be mutual, and founded upon an adequate consideration; that it be established by the clearest and most convincing evidence. Even then, when the contract limits a man's right

to dispose of his property by will, it is regarded with suspicion, and enforced only when it is apparent that the hand of equity is required to prevent a fraud upon the promisee." The doctrine thus promulgated has the approval of this court: *Rose v. Oliver*, 32 Or. 447 (52 Pac. 176). A fair statement of the reciprocal obligations between the parties may be gathered from the plaintiff's examination in chief, which is about as follows: She consented to give up her present lodging and music rooms, and live with her father and mother, and agreed to attend to and take care of her father during his sickness, to attend to and care for her mother, consult with and assist her in the management of her business affairs, but not to do the housework, and engage in her occupation of teaching music in subordination to the demands upon her time by her newly-assumed duties; and that the mother, upon the other hand, was to make over and give up all her property, so that everything would belong to the plaintiff at the time of her death. The testimony of the two witnesses referred to above would seem, in some measure, to corroborate this statement; but when we come to a consideration of the cross-examination and the future conduct of the parties we are led to conclude that such an agreement was never entered into.

4. Let us recount what was done. The mother attempted to make a will devising to plaintiff all her property; gave orders intended to enable Julia to obtain money to defray expenses for the mother's illness, and these documents were at once delivered into the hands of the plaintiff. The father remained at his home scarcely four weeks, during which time plaintiff had the care of him; but subsequently she did nothing, except to visit him frequently, and tell her mother of his condition, and transact such matters of business as paying butcher and grocery bills and the like, under the direction of her mother. The mother contracted with Griffin for the sale of her house and lot, and through him entered into a contract with Jaeger and Edwards, obligating herself to make a deed to them; subsequently made a quitclaim deed to them in furtherance of a clear title; had it deposited in escrow, depending for

its delivery upon the payment of the consideration; made arrangements with St. Vincent's Hospital for her care and attention while sick; contracted with the Sisters for a consideration of \$1,500, to be paid out of her estate, to furnish her with a home, board, lodging, and medicines during her natural life; and, finally, made a will disposing of her property entirely different from that designed by the attempted will of October 8,—and all this without consulting or advising with the plaintiff about any of the matters of business thus transacted. These acts are all inconsistent with the idea of a contract or agreement on her part to make over the property to the plaintiff. True, the mother could, if she had so desired, willfully have disregarded her solemn obligations; but the presumption is that a person acts in discharge of his bounden duty, rather than in disregard thereof, and so it is here we must take it that Mrs. Richardson was acting as she supposed it was her right to do. Ordinarily, persons have the right to revoke all prior wills, and dispose of any property they may possess, and all these acts of the mother are perfectly consistent with this idea. The plaintiff, while she gave up her separate lodgings, did not give up her music. She carried on her instructions while at her parents', and when her father went away she again took rooms elsewhere, and continued her instructions as before, so that she abandoned nothing of her former occupation in going to live with her parents. Indeed, the arrangement seems to have been suggested more by filial relations than as the result of a coldly-calculated business scheme with a view to a purchase of her mother's property. We say "purchase," because the alleged statement, if true, would amount to a contract of purchase, and this suit is instituted to enforce a specific performance of it. Plaintiff's restatement on cross-examination is not so clear, and almost at the close she says: "Well, now, of course, when I went up there, it was to make my home with her, as we both understood, until she died; and when the second arrangement was made [this has reference to the time her father went back to her sister's] I thought probably I would be affected by the change, and I asked her if it made any

difference, and she said, 'None whatever. * * * You can come and visit me, and these papers will be just the same.''' These acts and this latest statement of the plaintiff would seem to indicate that the mother at the time was desirous that the plaintiff should come and live with them, and had made up her mind to make her will bequeathing and devising to plaintiff all her property, so that she should have it at her death, expecting at the same time that plaintiff would be a comfort and help to both her and the father, and of assistance in the care and management of her minor business affairs, and that in consonance with this idea the will was attempted to be executed, and these orders given, and that what the plaintiff did was in obedience to her mother's wishes, and this is all there was of the alleged agreement. There were no reciprocal obligations made or entered into between them, and the mother, therefore, had the right and authority to subsequently dispose of her property as she saw fit. This is the most reasonable and consistent deduction from the acts and transactions of the parties that we are enabled to make, and at the farthest we cannot say the alleged contract or agreement is established by that clear and convincing evidence which is required in such a case.

5. There is another feature of the case that pertains to the adequacy of the consideration to support the alleged contract. Plaintiff served in taking care of her father less than four weeks. Practically speaking, she gave up nothing of her plans to do it,—that is, she continued her occupation as before,—at the end of which time she states that another arrangement was made, or the first modified, so that she was relieved entirely of the care of her father. She continued to assist her mother somewhat in the transaction of her smaller business concerns, but this is of little moment. Now, if it be conceded that the original agreement was that she should attend to and care for her father to the end of his days, she was by the later, or modified, arrangement relieved of that, so that it left scarce four weeks' service to stand as the consideration for an estate of the value of \$4,000, soon to come into her possession. It is at once

apparent that such a consideration is wholly inadequate to uphold the alleged undertaking. Surely, the hand of equity is not required to prevent a fraud upon the promisee.

6. The plaintiff has expended so little of her time in the care of her father—a duty that she owed him out of filial considerations—that it is not only inadequate as a consideration, but entirely insufficient as part performance to take the case out of the statute of frauds.

These considerations are supported by *Rose v. Oliver*, 32 Or. 447 (52 Pac. 176); *Shakespeare v. Markham*, 72 N. Y. 406; *Maddison v. Alderson*, 8 App. Cas. 467; and other cases cited in the first named authority, and affirm the decree of the court below.

AFFIRMED.

Decided 7 July, 1902.

ON OBJECTION TO TAXING COSTS.

Mr. E. B. Watson, objecting.

Mr. M. L. Pipes, contra.

MR. JUSTICE WOLVERTON delivered the opinion.

A decree was rendered in this case December 16, 1901, affirming the action of the trial court, and a petition for a rehearing denied during the following March term of the court: 66 Pac. 925. When the decree was entered the usual blank was left by the clerk for the amount of costs and disbursements, when settled and taxed. On May 9, and within sixty days from the denial of the petition for rehearing, appellant made application to the clerk for a mandate, whereupon he notified the respondent's attorneys of their omission to file a cost bill, and withheld the mandate in the meanwhile. On the next day (May 10) respondents served a cost bill, and filed the same two days later, to the allowance of which in any form the appellant objected, and the matter is brought here for determination.

Two reasons are assigned in support of the objection: (1) That the cost bill was not filed within a reasonable time after

the rendition of the decree; and (2) it was not presented for filing until after the mandate had been applied for, which, it is contended, should have been issued at once, as a matter of course, without the costs being inserted therein.

7. Under the statute the prevailing party may file his cost bill within five days after the entry of the judgment or decree, but, if delayed beyond that period, a copy must be served upon the opposite party; and no limit has been prescribed within which this may be done: Hill's Ann. Laws, § 556. Under the adjudication in *State v. Munds*, 7 Or. 80, it should be within a reasonable time, and the court say: "What would be a reasonable time may depend upon the circumstances of each particular case, but in no case would it be within a reasonable time to prolong the taxation beyond the commencement of the next ensuing term of the court." That was a question of taxation in the circuit court, and in a criminal case, where it was the duty of the clerk to attend to the ascertainment and taxation of such costs and disbursements. The conditions are somewhat different in this court. Under the rules a party has twenty days from the rendition of the judgment or decree to file a motion for rehearing, and if filed within the time, or any extension made by order of the court, no mandate can issue until disposed of. But when disposed of, it may issue as of course, upon the application of either party, within sixty days. Thereafter it can only issue by an order of the court: Rules 20-22 (37 Pac. ix.). The costs and disbursements being but an incident of the judgment or decree, it has been the custom of the clerk to leave a blank for their insertion when taxed and settled, leaving such judgment or decree incomplete in this respect. It has also been his custom to notify the appropriate party, when a mandate is called for, of the want of a cost bill, that he may have an opportunity of correcting the oversight. Under the rules and the practice, we are not prepared to say that an unreasonable time elapsed before the cost bill was served and filed, although done at the succeeding term of the court. The petition for rehearing had not been

disposed of before the beginning of the term, so that the matter had not then passed beyond the control of the court.

8. As to the second cause of objection, the appellant had a right to have the mandate issue as of course (that is, without the necessity of an order of the court), having made application for it within sixty days, but such application did not preclude the clerk from completing the record before issuing the mandate. His notice or request of the respondent's attorneys was for information to enable him to do this by inserting in the decree the amount of the costs and disbursements. This he did, under a custom of long standing, and, as it has not resulted in any injury to the defendant, the objection is without merit, and must be overruled. The costs and disbursements as stated in the cost bill will therefore be taxed and inserted in the decree, whereupon the mandate will issue.

AFFIRMED; OBJECTIONS OVERRULED.

Decided 16 August, 1901.

CARSON v. LAUER.

[65 Pac. 1060.]

TRIAL—INSTRUCTIONS ON MATTERS NOT IN ISSUE.

Juries must not be instructed on issues not found in the pleadings, and to do so is reversible error.

From Lane: JAMES W. HAMILTON, Judge.

Action for damages by Isaac Carson against E. H. Lauer and another, as administrators, in which there was a judgment for defendants, from which there was an appeal. REVERSED.

For appellant there was a brief and an oral argument by *Mr. W. C. Hale*.

For respondents there was a brief and an oral argument by *Mr. Geo. B. Dorris*.

MR. JUSTICE MOORE delivered the opinion.

This is an action to recover damages for the alleged breach of an agreement. The transcript shows that Charles Lauer, having secured a decree foreclosing a mortgage on certain lands in Lane County, Oregon, and recovering the sum of \$3,597.73 in the suit therefor, with interest, attorney's fees, costs, etc., entered into a contract with the plaintiff herein by the terms of which he agreed, in consideration of the receipt of \$1,200, and the payment of the remainder of said debt in one year, to assign to him all his interest in said decree; that he would cause the premises to be sold by the sheriff in two tracts, one of which had been conveyed by the mortgagors, S. C. and George M. Carson, to the plaintiff, and bid on each one half of said debt, taking the certificates of sale in his own name, as security for the remainder due; that, if no redemption of the mortgagors' part were made, he would, upon securing the sheriff's deed therefor, convey the whole premises to the plaintiff, who was to execute to him a mortgage thereon to secure the sum due, but if at said sale a third party should secure the mortgagors' part, by paying more than one half of said debt, the sum so received should be credited to plaintiff's account, or, if such part were redeemed, he would credit the money paid therefor in the same manner. The sheriff sold said property to Lauer for the sums of \$1,932 and \$2,205 for the plaintiff's and the mortgagors' shares, respectively; and at the time of sale there was growing on the latter's part a crop of wheat, to which they were entitled to a share as rent of the premises. Lauer assigned the certificate of sale of the mortgagors' part to one J. A. Bushnell, who secured and retained the landlords' share of said wheat. Bushnell and Lauer then assigned said certificates of sale to George and Edward Bailey in trust for plaintiff. Lauer died intestate, and the defendants, E. H. and Sarah Lauer, were appointed administrator and administratrix, respectively, of his estate; and, having duly qualified, they entered upon the discharge of their trust. It is alleged in the complaint that Lauer, in violation of his agreement, bid for the mortgagors' part of the land more than one half of said

debt, without plaintiff's knowledge or consent, and that, in violation of his contract, Lauer assigned to Bushnell said certificate of sale, whereby plaintiff lost the rent, and was compelled to pay the latter the sum of \$2,540, to secure a reassignment of the certificate, and was damaged thereby in the sum of \$752.05; that he presented a demand for said sum, as a verified claim against the decedent's estate, to the defendants, who rejected it; that no redemption from said sale was ever made, and that the time therefor has expired; that plaintiff at all times was able, ready, and willing to keep his part of the agreement, but was prevented from performing the whole thereof by Lauer. The defendants, after denying the material allegations of the complaint, averred that the contract entered into between the plaintiff and Lauer was modified by their mutual agreement, in pursuance of which the mortgagors' part of the land was sold for half of the principal debt and the entire costs. As a second defense, it is alleged that Bushnell, having secured from mortgagors their right thereto, redeemed their part of the land within the time prescribed by law, whereby he became entitled to said rent, and that he assigned said certificate to George and Edward Bailey, with plaintiff's consent. The reply having denied the material allegations of new matter in the answer, a trial was had, resulting in a verdict for the defendants; and, judgment having been rendered thereon, the plaintiff appeals.

The court instructed the jury as follows: "Now, the defendants set forth in their answer that the assignment of the certificate of sale was done by and with the consent of the plaintiff. That makes an issue for you to try, and to determine the fact in relation to the matter from the testimony. It was in the power of the parties to change the terms of the agreement. If this was done with the consent of the plaintiff after the agreement, and Mr. Lauer made the assignment with the consent of the plaintiff, then the plaintiff could not recover in this action." An exception having been taken to this portion of the charge, it is contended by plaintiff's counsel that the court erred in giving it. It is not negatived in the complaint

nor alleged in the answer that Lauer assigned the certificate of sale to Bushnell with plaintiff's consent. The court therefore assumed as true a fact that does not exist. This was undoubtedly the result of a hasty examination of the pleadings, for the plaintiffs, anticipating a defense upon that ground, alleged in the complaint "that, upon the sale of said tracts of land under said foreclosure, the said Charles Lauer, without the knowledge or consent of this plaintiff, and in violation of his agreements in said contract contained, bid on said tracts and purchased the same for unequal amounts, as hereinbefore set forth"; and this averment is denied in the answer, which also contains the following allegations: "That afterwards, to wit, on the twenty-first day of March, 1898, the said Charles Lauer, by and with the request and consent of the plaintiff, transferred the certificate of sale of the plaintiff's half of said land to one George Bailey and Ed Bailey; * * * that afterwards, to wit, on the twenty-first day of March, 1898, the said J. A. Bushnell did transfer the certificate of sale of the said S. C. Carson tract, to the said George and Ed Bailey, by and with the voluntary consent and wish of said plaintiff." These are the only averments to be found in the pleadings in respect to plaintiff's alleged consent, from which it will be seen that, while the alleged modification of the contract in respect to Lauer's bidding unequal sums for the separate tracts of land was put in issue, no issue existed in respect to the assignment of the certificate of sale by Lauer to Bushnell with plaintiff's consent. In *Howell v. Sewing Machine Co.* 12 Neb. 177 (10 N. W. 700), it was held that when, in consequence of a misstatement of the pleadings, an instruction has a tendency to confuse or mislead the jury, it is good ground for a new trial. To the effect that a misstatement by the court to the jury of the issues in a case on trial before them, whereby it is probable that the jury are confused or misled to the prejudice of a party, see *Stafford v. City of Oskaloosa*, 57 Iowa, 748 (11 N. W. 668); *Harley v. Merrill Brick Co.* 83 Iowa, 73 (48 N. W. 1000); *Marquette, etc. Ry. Co. v. Marcott*, 41 Mich. 433 (2 N. W. 795); *Reed v. Gould*, 93 Mich. 359 (53 N. W. 356); *Klosterman v.*

Olcott, 27 Neb. 685 (43 N. W. 422). The rule is well settled in this state that an instruction upon matters not put in issue by the pleadings is erroneous and furnishes cause for reversal: *Hayden v. Long*, 8 Or. 244; *Marx v. Schwartz*, 14 Or. 177 (12 Pac. 253); *Woodward v. Oregon Ry. & Nav. Co.* 18 Or. 289 (22 Pac. 1076); *Buchtel v. Evans*, 21 Or. 309 (28 Pac. 67); *Coos Bay R. Co. v. Siglin*, 26 Or. 387 (38 Pac. 192); *Pearson v. Dryden*, 28 Or. 350 (43 Pac. 166). The court having erred in giving the instruction complained of, the judgment is reversed and a new trial ordered. REVERSED.

Argued 11 November; decided 9 December, 1901; rehearing denied.

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ADAMSON v. FRAZIER.

[66 Pac. 810, 67 Pac. 300.]

WAREHOUSE RECEIPTS AS REPRESENTING PROPERTY.

1. Under sections 4201 and 4205, Hill's Ann. Laws*, regulating the storage of property in warehouses and the issuing of receipts therefor, an indorsement of a warehouse receipt by the person to whom it has been issued, is a transfer of the property itself, so that property stored in a warehouse and represented by a receipt cannot be attached as belonging to the depositor if he has theretofore endorsed his receipt: *Anderson v. Portland Flour. M. Co.* 37 Or. 483, applied.

ATTACHMENT OF GOODS IN WAREHOUSE—ANSWER OF GARNISHEE.

2. An answer by a warehouseman garnishee that he has in his care certain property stored by the defendant in the writ, for which he has issued negotia-

*Section 4201. It shall be the duty of every person keeping, controlling, managing, or operating, as owner, or agent, or superintendent of any company or corporation, any warehouse, commission house, forwarding house, mill, wharf, or other place where grain, flour, pork, beef, wool, or other produce, or commodity is stored, to deliver to the owner of such grain, flour, beef, pork, wool, produce, or commodity a warehouse receipt therefor, which receipt shall bear the date of its issuance, and shall state from whom received, the number of sacks, if sacked, the number of bushels, or pounds, the condition or quality of the same, and the terms and conditions upon which it is stored.

Section 4205. All checks or receipts given by any person operating any warehouse, commission house, forwarding house, wharf, mill, or other place of storage for any grain, flour, pork, beef, wool, or other produce, or commodity stored or deposited, and all bills of lading and transportation receipts of every kind, are hereby declared negotiable, and may be transferred by endorsement of the party to whose order such check or receipt was given or issued, and such endorsement shall be deemed a valid transfer of the commodity represented by such receipt and may be made either in blank or to the order of another.—REPORTER.

ble warehouse receipts, is not a statement that such property still belongs to the person who stored it, and if the property is afterwards claimed by genuine transferees of the warehouse receipts, the garnishee will not be liable on his answer, even though the case has proceeded to judgment, and an order has been entered directing the sale of the attached property described in his answer.

GARNISHMENT—EFFECT OF ADMITTING INDEBTEDNESS.

3. Where a garnishee by his answer to the writ admits an indebtedness to the attachment or execution debtor, a judgment may be entered that the officer collect such debt out of his property if he refuses to pay it on demand; but no personal judgment can be entered against him: *Barr v. Warner*, 38 Or. 109, explained as to par. 1, and corrected as to headnote 1.

From Multnomah: JOHN B. CLELAND, Judge.

Suit by Robert Adamson against Wm. Frazier, sheriff, and others, to restrain a sale of certain property in plaintiff's warehouse. There was a decree as prayed for, and defendants appeal.

AFFIRMED.

For appellants there was a brief over the name of *Platt & Platt*, with an oral argument by *Mr. Harrison G. Platt*.

For respondent there was a brief over the name of *Williams, Wood & Linthicum*, with an oral argument by *Messrs. Geo. H. Williams*, and *J. Couch Flanders*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

The plaintiff is a wharfinger and warehouseman, of Greenwich Wharf and Warehouse, in the City of Portland. At divers and sundry times prior to April 12, 1899, he received on storage as such warehouseman various lots and quantities of grain for the account of J. R. Cameron & Company, to whom he issued and delivered negotiable warehouse receipts for all but seven hundred and sixty four sacks of the grain so received. On April 12 the defendant Wells, Fargo & Company, caused a garnishment to be served on the plaintiff in an action brought by it against Cameron & Company, and in answer thereto the plaintiff furnished the sheriff a certificate, of which the following is a copy:

“For return to the garnishment served upon me as wharfinger of Greenwich Wharf and Warehouse No. 1, on April 12, 1899, in the suit of Wells, Fargo & Co. v. J. R. Cameron & Co., I state that I have no moneys in my possession belonging to J. R. Cameron or J. R. Cameron & Co. There is in my possession as such wharfinger the following property, which had been received by me as such wharfinger on various dates and times prior to the service upon me of such garnishment, and for the account of J. R. Cameron & Co.; 33,118 sacks of wheat of various grades and qualities, against which such wheat I had previous thereto issued for the account of J. R. Cameron & Co. negotiable warehouse receipts for 21,505 sacks of wheat, and also for 23,549 bushels of wheat; also 3,800 sacks of barley, against which I had previous thereto issued for the account of J. R. Cameron & Co. negotiable warehouse receipts for 3,800 sacks of barley. All of such wheat and barley is subject to warehouse and storage charges.”

A few days later he made an amended certificate, for the purpose of correcting an error in the original as to the quantity of wheat. Prior to the garnishment, although unknown to the plaintiff, Cameron & Company had sold and transferred the wheat receipts, for value, to *bona fide* purchasers, who a short time thereafter presented them and demanded possession of the grain, which was delivered accordingly. Wells, Fargo & Company subsequently recovered judgment in the action against Cameron & Company, and an order for the sale of the attached property. An execution having been issued thereon, the sheriff advertised for sale, as the property of Cameron & Company, and on storage with the plaintiff, the quantity of wheat mentioned in his certificate, whereupon this suit was commenced to determine the conflicting claims of the defendants Wells, Fargo & Company and Mariner to five hundred and three sacks of the wheat for which receipts had not been issued, and to enjoin the sheriff (Frazier) from selling or attempting to sell any grain for which receipts had been issued. By stipulation of the parties, Mariner was allowed the five hundred and three sacks, and the suit was dismissed as to him. The court below held that the attachment operated and took effect only upon the remainder of the grain for which re-

ceipts had not been issued, and entered a decree accordingly, from which the defendant Wells, Fargo & Company appeals.

1. The warehouse receipts for the grain stored with plaintiff on account of Cameron & Company stood for and represented the property, and their transfer was a valid transfer of the commodity itself, so that at the time of the attachment Cameron & Company did not own the wheat covered by the receipts, and had no attachable interest therein: Hill's Ann. Laws, § 4201, *et seq.*; *State v. Koshland*, 25 Or. 178 (35 Pac. 32); *Anderson v. Portland Flouring Mills Co.* 37 Or. 483 (82 Am. St. Rep. 771, 60 Pac. 839, 50 L. R. A. 235).

2. It is contended, however, that the judgment in the action brought by Wells, Fargo & Company is a conclusive determination, as against the plaintiff, of the quantity of grain in his possession belonging to Cameron & Company at the time of the service of the writ, and that he is bound thereby. It is argued that, inasmuch as he received information before the judgment that the wheat receipts had been sold prior to the garnishment, he should have amended his certificate by showing that fact, and because of neglect in that respect he must now deliver to the sheriff the quantity of wheat specified in his certificate, to be sold under the execution issued on the judgment, although in fact it did not belong to the defendant in the writ. Many authorities are cited to the effect that it is the duty of a garnishee to make a full disclosure, either in his original or by an amended answer, of all facts within his knowledge affecting his liability, and that equity will not afford him relief when he could have protected himself by amending his answer or appealing from the judgment against him. But the judgment in the law action was not against the plaintiff in this suit. He was not a party to the action, and had no right to appear or to be heard therein as to the form or character of the judgment. An order for the sale of attached property is not conclusive, as between the parties, of all questions concerning the liability of the attached property to an execution on the judgment [*Berry v. Charlton*, 10 Or. 362; *Barr v. Rader*, 33 Or. 375, 378 (54 Pac. 210)]; and, clearly, it

cannot affect the rights of a person not a party, and who has no opportunity to be heard. Where a judgment is rendered in a proceeding against a garnishee, the rule contended for by defendant would, no doubt, apply the same as in any other case. But such a proceeding can only be instituted when the garnishee refuses to give a certificate as required by the statute, or when the certificate given is unsatisfactory to the plaintiff (Hill's Ann. Laws, § 152), and then only by serving upon him written allegations [Hill's Ann. Laws, §§ 163, 164; *Case v. Noyes*, 16 Or. 329 (19 Pac. 104); *Smith v. Conrad*, 23 Or. 206 (31 Pac. 398)]. The service of the writ on the plaintiff merely operated as an attachment of such property of defendant as was then in his possession, and his certificate afforded the basis of subsequent proceedings against him if deemed necessary; but it did not authorize the entry of a judgment against him in the original action, nor is he concluded by any decision of the court as to its sufficiency or effect.

Under the statute (Hill's Ann. Laws, § 149), personal property in the hands of a third person is attached by leaving a certified copy of the writ and a notice specifying the property with such person, who is required to furnish the officer with a certificate designating the amount and description of the property, if any, in his hands, belonging to the defendant (Hill's Ann. Laws, § 152). If it appears from such certificate that the garnishee has in his possession property belonging to the defendant, and a judgment is subsequently rendered in favor of the plaintiff in the action, and an execution issued thereon, the sheriff is required, unless the property is delivered to him, to levy upon it wherever he may find it: Hill's Ann. Laws, § 284. It is therefore probable that a garnishee would not be permitted to dispute his certificate in case the sheriff should attempt to levy upon property he thereby admitted was in his possession, belonging to the defendant, at the time of the service of the writ. But here the certificate of the plaintiff does not show his possession of any such property. All it shows is that he was in possession of a certain quantity of grain received for storage on account of Cameron & Company, for

which he had issued negotiable warehouse receipts, then outstanding. This is not an admission that the property then belonged to Cameron & Company; hence he has not contradicted his certificate by showing that the wheat receipts were at the time owned by other parties. He had neither opportunity nor need to make such a showing in the law action, and it certainly would be inequitable and unjust, after he had delivered the property to the rightful owners under his contract of bailment, to require him to answer for its value to the defendant in this suit, which by its attachment could not and did not acquire any greater interest in the property than that of Cameron & Company.

AFFIRMED.

Decided 9 December, 1901.

ON PETITION FOR REHEARING.

MR. CHIEF JUSTICE BEAN delivered the opinion.

3. Our attention has been attracted to the headnote in *Barr v. Warner*, 38 Or. 109 (62 Pac. 899), in which it is said "The effect of a certificate of indebtedness by a garnishee is to make such garnishee a party to the action, and to authorize a judgment against him for the debt or property of the debtor that he may have in his possession." This statement by the reporter of the doctrine of the opinion is not entirely accurate. As preliminary to the question in the case, Mr. Justice MOORE discusses the effect of a certificate of a garnishee admitting an indebtedness to the execution debtor, and says that under our statute it "is equivalent to making a garnishee a party to any judgment that may be or has been given therein." But this is only to the extent that an execution issued thereon may be levied upon the property of the garnishee if he refuses to pay the debt to the officer on demand. It is evident from the opinion that it was considered that such a result flows from the statute and the admission of the garnishee, and not from any judgment that might be rendered against him in the action. When a garnishee admits in his certificate that he is in possession of property belonging to the defendant in the writ, or is

indebted to him, the statute provides the procedure in case a judgment is rendered in the principal action: Hill's Ann. Laws, § 284. But when he does not make such an admission, the only remedy against him is that provided in sections 163 and 164. In no event is he a party to the original action, in the sense that a judgment can be rendered against him therein.

The other points suggested in the petition were not overlooked by the court, and we do not deem it necessary to notice them further. The petition for rehearing is therefore denied.

REHEARING DENIED.

Argued 27 November; decided 30 December, 1901.

PACIFIC BUILDING COMPANY v. HILL.

[56 L. R. A. 163, 67 Pac. 103.]

BUILDING AND LOAN COMPANIES NOT BANKING CORPORATIONS.

1. A foreign corporation making loans upon security of real estate and pledges of its own stock is not a "banking corporation," within Hill's Ann. Laws, §§ 3276, 3277, requiring such a corporation to record a power of attorney in each county where it has a resident agent.

BUILDING AND LOAN COMPANY—USURIOUS CONTRACT.*

2. A contract by a borrower from a loan company under which he purchases a stated amount of stock in the company, at once assigns half of his purchase to the company absolutely, as a premium for the loan, and then pays the monthly assessments on his entire subscription, together with six per cent. interest on the amount borrowed, is usurious, since the interest and monthly assessments combined amount to more than ten per cent. on the loan, and no higher rate than ten per cent. can be directly or indirectly paid for the use of money in this state. A company doing a loan business on that plan is not a legitimate building and loan association, and all payments made by the borrower should go to the extinguishment of the loan with the interest that may have accumulated thereon at the agreed rate.

INTERPRETATION OF CONTRACT—PLACE OF PERFORMANCE.**

3. The general rule that a contract for the payment of money, entered into *bona fide* in one state, and made payable in another, will be construed and enforced according to the laws of the state where payable, is subject to the qualification that no state is bound to enforce in its courts any contract that is injurious to its public rights or offends its morals, or contravenes its public policy. For example, a contract made in Oregon between a citizen of Oregon and a foreign corporation doing business in Oregon, to be executed by the payment of money in California, but relating to Oregon land, the contract being usurious by the laws of Oregon, but valid under the laws of California, will not be construed in Oregon as a California contract and so enforced; but will rather be considered an Oregon contract to be governed by the Oregon laws. Particularly is this true where the surrounding circumstances justify the conclusion that the contract was drawn with the intention of evading the Oregon laws and court decisions.

*NOTE.—On the question of usury in this kind of a contract see *Gray v. Baltimore Build. & Loan Assoc.* 54 L. R. A. 217; *Floyd v. National Loan & Invest. Co.* 54 L. R. A. 536; *Iowa Sav. & Loan Assoc. v. Heldt*, 70 Am. St. Rep. 197, 43 L. R. A. 689; *Johnson v. National Build. & Loan Assoc.* 82 Am. St. Rep. 257, and *Howells v. Pacific St. Sav. & B. Co.* 81 Am. St. Rep. 659, with note, Unconscionable Contracts. In 14 Am. & Eng. Corp. Cas. 647, is a note, Usury in Contracts by Building and Loan Associations.—REPORTER.

**NOTE.—As to the construing of contracts made in one state, payable in a second state, but secured by a mortgage of land in the first state, see *Floyd v. National Loan & Invest. Co.* 54 L. R. A. 536, and particularly *McIlwaine v. Ellington*, 55 L. R. A. 933, with extensive note discussing whether a mortgage on real property should be tested by the same law as to interest and usury that applies to the personal obligation which it secures.—REPORTER.

40	280
40	514
40	515
40	620

40	280
42	46
42	74
42	106

40	280
45	139

From Linn: REUBEN P. BOISE, Judge.

The plaintiff, the Pacific States Savings, Loan and Building Association, is a private corporation, organized and having its principal place of business at San Francisco, California. On October 22, 1891, the defendant, J. L. Hill, made written application for membership in the company, and subscribed for seventy "A" shares of its capital stock. On the twenty-fourth the company issued its certificate for the desired shares, which was accepted with the conditions attached thereto, viz., the shareholder to pay sixty cents monthly upon each share, until matured or withdrawn, to the treasurer of the company in San Francisco, provided, however, the treasurer might appoint a collecting agent to receive and receipt for such monthly payments. Whenever the monthly payments made on any share, together with the profits, amounted to \$100, such share should be deemed to have matured, and might be retired. The certificate bears date and purports to have been executed in San Francisco. On the back thereof appears an assignment of sixty shares of the stock to the company bearing date February 24, 1892. On the same day that he applied for membership, he also made application to the board of directors, at its home office, for a loan of \$3,000 upon his bond and a mortgage to secure the same on realty situated in Albany, Oregon, in making which he represented that he resided at that place, and proposed using the money "in other business," and the venue of his verification is laid in Linn County, Oregon. Attached to the application is a certificate of J. L. Cowan, J. P. Galbraith, and A. O. Archibald, officers and directors of the company's local board at Albany, Oregon, addressed to the board of directors at its home office, recommending the loan. The maximum and minimum of premiums having been duly fixed by the board of directors, and there being more than two bidders for the loan, and Hill being the highest and best bidder, the board, by a resolution, granted his application December 15, 1891, whereby it was resolved, among other things, "that there be paid to the persons hereinafter named, members of

the company, on account of applications made and loans granted, the several sums set opposite their names, and that the president and secretary of the company execute an order on the California Title, Insurance & Trust Company, trustee, requiring it to make such payments: * * * Wallace H. Lee, Albany, Oregon, \$800; Nicholas Portman, Sellwood, Oregon, \$800. Application for loan of \$3,500 to Dr. J. L. Hill, Albany, Oregon, was considered and granted for \$3,000.”

On February 9, 1892, Hill put in a written bid for a loan of \$3,000, whereby he agreed to hold sixty shares of the stock and continue payment of installments thereon until maturity, or the loan was otherwise paid, and also to pay the company a bonus of thirty shares of such stock as a consideration for the loan, and on the sixteenth the company advanced and loaned to Hill the sum bid for upon terms and conditions stated in the bond executed by him and wife for the repayment of the same. To secure the bond, Hill and wife made, executed, and delivered to plaintiff a mortgage upon real estate in Albany. Both the bond and mortgage were dated and executed, and the mortgage acknowledged, in Linn County, Oregon. The conditions of the bond are that Hill shall pay to the company at the office of its treasurer in the City of San Francisco, on or before seven years from date, \$3,000, and the full amount of the premium, if sixty shares have matured and become worth par, or, in case said stock has not matured, then so much of said premium as may have been earned at the time the whole of the sum advanced is repaid, together with interest thereon at the rate of six per cent. per annum from the sixteenth day of February, 1892, payable monthly; or shall pay the sum of \$36 on the second Tuesday of each month as and for the monthly dues on sixty shares, the further sum of \$15 per month as and for the monthly installments of interest on the loan at the rate of six per cent. per annum, and all fines and charges that may become due on such stock until fully matured; then, and in either case, the obligation to become void, otherwise to be and remain in full force and virtue; provided, however, that, in case default is made in any payment stipulated for,

the whole sum advanced, together with such proportion of the premium as has been earned, shall, at the election of the company, without notice, become due and payable, and the whole, less the withdrawal value of the sixty shares of capital stock, may be enforced and recovered, together with accrued interest, fines, and charges. There is a further stipulation that the whole of the premium shall be deemed to have been earned, due, and payable whenever the sixty shares of stock shall have matured, and one seventh of such premium shall be deemed to have been earned each year or fraction thereof elapsing after the date of the bond. The mortgage contains some additional stipulations, but default is dependent upon the conditions of the bond. The by-laws of the company provide, *inter alia*, that the stock shall be payable in monthly installments of fifty-two cents, and an expense fee of eight cents per share; that all members making applications for loans may have the privilege of offering premiums therefor within certain limits, the maximum and minimum to be fixed by the board of directors, and that in localities where not less than one hundred shares have been subscribed, and first payment made, a local board, consisting of not less than five members, each holding not less than ten shares, may be nominated by the agent of the company, and appointed by the board of directors, the duties of the members of the local board being to promote the increase of membership, urge the prompt payment of installments, and advise the board of directors in relation to loans in their locality.

This suit was instituted October 9, 1899, to foreclose the mortgage. The complaint sets out all the facts, stipulations, and obligations hereinbefore stated and recounted, and it is further alleged that the monthly payments on said sixty shares of stock agreed to be made by the defendants, from and inclusive of the second Tuesday of November, 1891, to the second Tuesday of August, 1899, amount to the sum of \$3,348, of which \$3,132 has been paid, leaving due from defendants to plaintiff \$216, as and for the monthly dues on sixty shares of stock; that of the said \$3,132 paid, \$1,566 was paid to plain-

tiff in accordance with the bid for the loan, and, with the knowledge and consent of the defendants, applied to the payment of the monthly dues on the thirty shares of stock so bid as a premium, and \$1,566 to the payment of the monthly dues of the said thirty shares of stock so pledged with plaintiff for the payment of said loan; that the monthly installments of interest on said loan at the rate of six per cent. per annum up to the second Tuesday of August, 1899, amount to \$1,350, of which sum \$1,260 has been paid, leaving due the sum of \$90 on monthly installments of interest on the loan; that the said thirty shares of stock pledged for the payment of such loan are not fully paid in, nor have they become worth par, or any greater sum than \$82.50 per share. The prayer is for a decree awarding to plaintiff the sum of \$3,306, less \$2,475, the present value of the shares pledged, and attorney's fees and costs. There was a demurrer to the complaint, which resulted in a dismissal of the suit, and plaintiff appeals. AFFIRMED.

For appellant there was a brief and an oral argument by *Messrs. G. W. Allen, and George W. Wright* to this effect:

The plaintiff corporation is not included in the list mentioned in Sections 3276 and 3277 of Hill's Ann. Laws: *Oregon & Wash. L. & Invest. Co. v. Rathburn*, 5 Sawy. 32; *New Eng. Mtg. Sec. Co. v. Vader*, 28 Fed. 265; *Singer Mfg. Co. v. Graham*, 8 Or. 17, 21.

The law of the place of performance of a contract determines its validity, as well as the question of usury: *Tiedman*, Com. Paper, § 506; *Rorer*, Interstate Law, p. 69; *Hubble v. Morristown L. Improv. Co.* 95 Tenn. 590 (32 S. W. 965); *Ware v. Bankers L. & Invest. Co.* 95 Va. 680 (29 S. E. 745, 64 Am. St. Rep. 826); *National Mut. B. & L. Assoc. v. Ashworth*, 91 Va. 706 (22 S. E. 521); *Tobin v. McNab*, 53 S. C. 73 (30 S. E. 827); *United States S. & L. Co. v. Miller*, 47 S. W. 17; *Bigelow v. Burnham*, 83 Iowa, 120 (32 Am. St. Rep. 294, 49 N. W. 104); *Peck v. Mayo*, 14 Vt. 33 (39 Am. Dec. 205); *Healy v. Gorman*, 15 N. J. Law, 328; *Arnold v. Potter*, 22 Iowa, 194; *McAllister v. Smith*, 17 Ill. 328 (65 Am. Dec. 651); *Butler v.*

Edgerton, 15 Ind. 15; *Oregon & Wash. Invest. Co. v. Rathburn*, 5 Sawy. 35; *Hollis v. Covenant B. & L. Assoc.* 104 Ga. 318 (31 S. E. 215); *Parker v. Association*, 46 Ga. 166; *Butler v. Investment Co.* 94 Ga. 562; *Reeve v. Ladies' Bldg. Assoc.* 56 Ark. 335-377 (19 S. W. 917, 18 L. R. A. 129).

Again, a loan of the nature of the one from appellant to respondent is not usurious because the payments were made upon the stock debt and not upon the loan: *Building & Loan Assoc. of Dakota v. Price*, 169 U. S. 45 (18 Sup. Ct. 251); *Richard v. Southern B. & L. Assoc.* 49 La. An. 481 (21 South. 643); *Towle v. American B. L. & Invest. Soc.* 61 Fed. 446; *Strohm v. Franklin Sav. Fund & L. Assoc.* 115 Pa. St. 273; *Reeves v. Ladies' Bldg. Assoc.* 56 Ark. 335 (18 S. W. 917, 18 L. R. A. 129); *American Homestead Co. v. Linigan*, 46 La. An. 1118 (15 South. 369); *Pattison v. Albany B. & L. Assoc.* 63 Ga. 373; *Delano v. Wild*, 6 Allen, 1 (80 Am. Dec. 605); *Shannon v. Dunn*, 43 N. H. 194; *Hammerslough v. B. L. & Sav. Assoc.* 79 Mo. 80; *Clarksville B. & L. Assoc. v. Stephens*, 26 N. J. Eq. 351; *Cason v. Seldner*, 77 Va. 297; *Pioneer, etc. Loan Co. v. Cannon*, 96 Tenn. 599 (54 Am. St. Rep. 858); *Sullivan v. Jackson B. & L. Assoc.* 70 Miss. 94; *State v. Hombacker*, 42 N. J. Law, 635; *Watkins v. Workingmen's B. Assoc.* 97 Pa. St. 514; *New Jersey B. & L. Invest. Co. v. Bachelor*, 5 N. J. Eq. 600; *Thornton & Blackledge, B. & L. Assoc.* § 237; *Montgomery B. & L. Assoc. v. Robinson*, 69 Ala. 413; *Shannon v. Dunn*, 43 N. H. 194; *Winget v. Quincy B. & Homestead Assoc.* 128 Ill. 67; *Central B. & L. Assoc. v. Lampson*, 60 Minn. 422; *Concordia S. & Aid Assoc. v. Read*, 93 N. Y. 474; *Payne v. Freer et al.* 91 N. Y. 43 (43 Am. Rep. 640); *Holmes v. Smythe*, 100 Ill. 420; *Freeman v. Ottawa B. Assoc.* 114 Ill. 182; *Red Bank Mut. B. & L. Assoc. v. Patterson*, 27 N. J. Eq. 223; *Bosworth v. Sumpter R. E. Co.* 100 Ga. 60; *Livingston L. & B. Assoc. v. Drummond*, 49 Neb. 200; *Equitable B. & L. Assoc. v. Vance*, 49 S. C. 402 (27 S. E. 274, 29 S. E. 204); *McLaughlin v. Citizen's B. L. & Sav. Assoc.* 62 Ind. 264.

The following authorities also support appellant's view of the law that the contract sued on is not an Oregon contract:

Thornton & Blackledge, B. & L. Assoc. § 280; *National Mut. B. & L. Assoc. v. Ashworth*, 91 Va. 706 (22 S. E. 521); *Interstate S. & L. Assoc. v. Knapp*, 20 Wash. 225; *Pioneer, etc. L. Co. v. Cannon*, 96 Tenn. 599 (54 Am. St. Rep. 858); *Bennett v. Eastern B. & L. Assoc.* 117 Pa. St. 233 (55 Am. St. Rep. 723); *Equitable B. & L. Assoc. v. Hoffman*, 50 S. E. 303; *Freeie v. Fidelity Bldg. Union*, 166 Ill. 128 (57 Am. St. Rep. 123); *Farmers' & Mech. Sav. Co. v. Bazon*, 67 Ark. 252 (54 S. W. 339); *Equitable B. & L. Assoc. v. Vance*, 49 S. C. 402 (27 S. E. 274, 29 S. E. 204); *Association v. Besford*, 88 Fed. 7; *Pritchard v. Norton*, 106 U. S. 124 (1 Sup. Ct. 102); *Coglan v. South Carolina R. Co.* 142 U. S. 101 (12 Sup. Ct. 150); *Allen v. Hirsch*, 8 Or. 412, 421; *Crawford v. Linn County*, 11 Or. 482, 500; *International B. & L. Assoc. v. Wall*, 153 Ind. 554 (55 N. E. 431); *Southern B. & L. Assoc. v. Rector*, 98 Fed. 171-2-3; *Security Sav. & L. Assoc. v. Elbert*, 153 Ind. 198 (54 N. E. 753); *Vermont L. & Tr. Co. v. Whithed*, 2 N. Dak. 82-92-100 (49 N. W. 318); *Andruss v. People's B. L. & S. Assoc.* 94 Fed. 575 (36 C. C. A. 343).

There is no force in the contention that the mortgage is a local contract and cannot be affected by the laws of California or the law of the place of payment of the note which the mortgage secures. While it is true that the mortgage must be enforced by the method provided by the Oregon law it is neither good law nor sound reasoning to insist that the mortgage given to secure the note cannot be enforced when the note itself is valid: *Pritchard v. Norton*, 106 U. S. 129 (1 Sup. Ct. 102); *Latham v. Washington*, 77 N. C. 145; *Dygert v. Vermont L. & T. Co.* 94 Fed. 913.

As the amended complaint shows upon its face that the stock subscribed for by Hill has not become worth par, it cannot be claimed on a general demurrer that Hill has paid off his obligation to the company, for his contract was that he would pay monthly dues on his stock until it should become worth \$100 per share or to be otherwise paid: *Towle v. American B. L. & Invest. Soc.* 61 Fed. 446; *Strohen v. Franklin Sav. F. & L. Assoc.* 115 Pa. St. 273 (8 Atl. 343); *Reeve v. Ladies' B.*

Assoc. 56 Ark. 335-337 (18 L. R. A. 129, 19 S. W. 917); *People's B. & L. Assoc. v. Furey*, 47 N. J. Eq. 410-413; *State of Washington B. & L. Assoc. v. Hombacker*, 42 N. J. Law, 635-638; Endlich, *Bldg. Assoc.* §§ 452-456; Thornton & Blackledge, *B. & L. Assoc.* § 162.

For respondent there was an oral argument by Messrs. N. M. Newport, and Henry H. Hewitt, with a brief over the names of Weatherford & Wyatt, Hewitt & Sox, and Cannon & Newport, to this effect:

The contract set out in the complaint is to be enforced under the laws of Oregon, and therefore the question as to whether or not the contract is usurious must be determined by the laws of Oregon: *Harman v. Hart* (Tenn.), 53 S. W. 310; *People's B. L. & Sav. Assoc. v. Kidder*, 9 Kan. App. 385 (58 Pac. 798); *Fidelity Sav. Assoc. v. Shea* (Idaho), 55 Pac. 1022, 1025; *Building & L. Assoc. of Dakota v. Griffin*, 90 Tex. 480 (39 S. W. 656); *Meroney v. Atlanta B. & L. Assoc.* 116 N. C. 882 (47 Am. St. Rep. 841, 21 S. E. 924); *Bank of Ogden v. Davidson*, 18 Or. 57, 70 (22 Pac. 517); *Vermont L. & T. Co. v. Hoffman*, 37 L. R. A. 509 (49 Pac. 314, 319).

Where a borrower subscribed for stock in a loan association merely to obtain a loan and is required to make monthly payments upon such shares, and by the terms of the contract the maturity of the shares extinguishes the debt and cancels the stock, the borrower is a stockholder in fiction and not in fact, and the actual relation between the parties is only that of creditor and debtor, and the transaction is purely one of borrowing and lending: *Herbert v. Kenton, B. & S. Assoc.* 74 Ky. (11 Bush) 296; *Gordon v. Assoc.* 75 Ky. (12 Bush) 110 (23 Am. St. Rep. 713); *Henderson B. & L. Assoc. v. Johnson*, 88 Ky. 191 (10 S. W. 787); *Southern B. & L. Assoc. v. Harris*, 98 Ky. 41 (32 S. W. 261, 3 L. R. A. 289); *United States Sav. & L. Assoc. v. Scott*. 98 Ky. 695 (34 S. W. 235); *Simpson v. Kentucky Citizen's B. & L. Assoc.* 101 Ky. 496 (41 S. W. 570); *Fidelity Sav. Assoc. v. Shea* (Idaho), 55 Pac. 1022; *Hale v.*

Stenger, 22 Wash. 699 (61 Pac. 156); *Meroney v. Atlanta B. & L. Assoc.* 116 N. C. 882 (21 S. E. 924, 47 Am. St. Rep. 841); *People's B. L. & Sav. Assoc. v. Kidder*, 9 Kan. App. 385 (58 Pac. 798).

Payments made to a building and loan association in excess of the rate allowed by law upon a loan are usurious: *Southern B. & L. Assoc. v. Atkinson*, 20 Tex. Civ. App. 516 (50 S. W. 170); *People's B. L. & S. Assoc. v. Keller*, 20 Tex. Civ. App. 616 (50 S. W. 183); *International B. & L. Assoc. v. Biering*, 86 Tex. 476 (25 S. W. 622); *James v. James, Trustee*, 21 Ky. Law Rep. 1401 (55 S. W. 193); *Stevens v. Home Sav. & L. Assoc.* (Idaho), 51 Pac. 779, 986; *People's B. & L. Assoc. v. Kidder*, 9 Kan. App. 385 (58 Pac. 798); *National B. & L. Assoc. v. Gallagher*, 21 Ky. Law Rep. 1140 (54 S. W. 209); *Fidelity Sav. Assoc. v. Shea* (Idaho), 55 Pac. 1022; *McCaulley v. Workman's B. & L. Assoc.* 97 Tenn. 421 (35 L. R. A. 244, 56 Am. St. Rep. 813, 37 S. W. 212); *Building & L. Assoc. of Dakota v. Griffin*, 90 Tex. 480 (39 S. W. 656); *Meroney v. Atlanta B. & L. Assoc.* 116 N. C. 882 (21 S. E. 924, 47 Am. St. Rep. 841); *Building & L. Assoc. of Dakota v. Walker*, 59 Neb. 456 (81 N. W. 308); *Interstate S. & L. Assoc. v. Strine*, 58 Neb. 133 (78 N. W. 377); *Matthews v. Interstate B. & L. Assoc.* 50 S. W. 604; *Milnor v. People's B. & L. Assoc.* (Ky.) 48 S. W. 732; *People's B. & L. Assoc. v. Rising* (Tex. Civ. App.) 34 S. W. 148; *Rhodes v. Missouri S. & L. Co.* 173 Ill. 621; *Hollowell v. Southern B. & L. Assoc.* 120 N. C. 286 (26 S. E. 781); *Smith v. Old Dom. B. & L. Assoc.* 119 N. C. 249 (26 S. E. 40); *Herbert v. Kenton B. & S. Assoc.* 74 Ky. (11 Bush) 296; *Henderson B. & L. Assoc. v. Johnson*, 88 Ky. 191 (3 L. R. A. 289, 10 S. W. 787); *Waverly Mut. L. & B. Assoc. v. Buck*, 64 Md. 338 (1 Atl. 561); *Mechanics & Farmers' B. & L. Assoc. v. Dorsey*, 15 S. C. 462; *Martin v. Nashville B. Assoc.* 42 Tenn. (2 Cold.) 418.

The contract is unconscionable and for that reason the court will not enforce it according to the construction contended for by appellant: *Mills v. Salisbury B. & L. Assoc.* 75 N. C. 292; *Southern B. & L. Assoc. v. Harris*, 98 Ky. 41 (32 S. W. 261);

Randall v. National B. L. & P. Union, 43 Neb. 876 (62 N. W. 252); *Rowland v. Old Dominion B. & L. Assoc.* 116 N. C. 877 (22 S. E. 8).

The contract set out in the complaint shows a scheme to avoid the usuary laws of the state: *Cotton States B. Co. v. Reily*, 50 S. W. 961; *Howells v. Pacific States S. L. & B. Co.* 21 Utah, 45 (81 Am. St. Rep. 659, 60 Pac. 1025); *Meroney v. Atlanta B. & L. Assoc.* 116 N. C. 882 (21 S. E. 924, 47 Am. St. Rep. 841).

The statute of 1891, p. 131, contemplates bidding in order to establish a right to a preference in obtaining a loan. Therefore a loan made under a by-law that fixes a minimum premium is usurious, as such by-law curtails the freedom of the bidder and is not permissible under the statutes: *McCauley v. Workingmen's B. & S. Assoc.* 97 Tenn. 421 (37 S. W. 212, 35 L. R. A. 244, 56 Am. St. Rep. 813); *Bates v. People's S. & L. Assoc.* 42 Ohio St. 655; *State v. Greenville B. & L. Assoc.* 29 Ohio St. 92; *Stiles' Appeal*, 95 Pa. St. 122; *Post v. Mechanics' B. & L. Assoc.* 97 Tenn. 408 (37 S. W. 216, 34 L. R. A. 201).

The contract being one of loan, in a procedure to foreclose the mortgage by which the loan is secured the borrower is entitled to credit for all payments made whether characterized as premium, dues, interest, fines, or otherwise, and to have the account adjusted on the principle of partial payments: *Safety B. & L. Co. v. Ecklar* (Ky.), 50 S. W. 50; *Graham v. Housebuilding & L. Assoc.* (Tenn.) 52 S. W. 1011; *Stevens v. Home Sav. & L. Assoc.* (Idaho) 51 Pac. 986; *People's B. & L. Assoc. v. Kidder*, 9 Kan. App. 385 (58 Pac. 798); *Hale v. Stenger*, 22 Wash. 699 (61 Pac. 156); *North Texas S. & B. Assoc. v. Hay*, 23 Tex. Civ. App. 98 (56 S. W. 580); *Sawtelle v. North Amer. S. L. & Co.* 14 Utah, 443 (48 Pac. 211); *People's B. L. & S. Assoc. v. Fowble*, 17 Utah, 122 (53 Pac. 999); *Hale v. Thomas*, 20 Utah, 426 (59 Pac. 241); *Brown v. Archer*, 62 Mo. App. 277; *Houser v. Herman B. Assoc.* 41 Pa. St. 478; *Dowell v. Safety B. & L. Co.* 21 Ky. Law Rep. 1267 (54 S. W. 845).

When the complaint shows that the cause of action is based upon a usurious contract the principal of which has been fully paid, a general demurrer to such complaint should be sustained: *Stevens v. Home Sav. & L Assoc.* (Idaho) 51 Pac. 779; *Interstate S. & L. Assoc. v. Cairns*, 16 Wash. 215 (47 Pac. 509).

MR. JUSTICE WOLVERTON, after stating the facts in the foregoing terms, delivered the opinion of the court.

1. It will be noted that these transactions of which the complaint speaks were had, and the loan consummated, before the passage of the act of 1895, regulating the incorporation and business of building and loan and savings and loan associations doing a general business, and it is claimed that the loan was lawfully negotiated, although the company had not at the time executed and acknowledged a power of attorney, appointing a citizen and resident of the state as its attorney, with authority to accept, and upon whom lawful service may be made of, writs and process necessary to give jurisdiction of the incorporation to any of the courts of the state, as prescribed by Hill's Ann. Laws, §§ 3276, 3277. To overcome this position, it is maintained, upon the other side, that the plaintiff is a banking concern. We do not think enough appears by the record by which it can be so classified. It is, rather, to be denominated a loan company or association, and not such an institution as comes within the purview of the statute cited: *Singer Mfg. Co. v. Graham*, 8 Or. 17 (34 Am. Rep. 572); *Commercial Bank v. Sherman*, 28 Or. 573 (43 Pac. 658, 52 Am. St. Rep. 811); *Oregon & Wash. Invest. Co. v. Rathburn*, 5 Sawy. 32 (Fed. Cas. No. 10,555). It was, therefore, lawful, without the observance of the conditions there prescribed, for it to do or transact business in this state. It must be conceded that it is beyond the power of the legislature, by retrospective act, to impair, in any degree, the obligations of a contract; nor are we advised of any provision of the act of 1895 that impinges upon this principle. Apparently, the act was drafted

with a view to avoid such a contingency, as witness the declarations of section 7 relating to usury.

2. Plaintiff insists that it is a legitimate building and loan or savings and loan association, organized and operating under the special plan or system that characterizes those peculiar organizations or associations. But, to show that it is not, we will advert to one feature of its plan of operation. It requires a bidding to fix the amount of the premium, which, no doubt, is legitimate. But it exacts of the purchaser of the loan, or the borrower, that he bid a certain amount of his stock (in this case, fifty per cent.), which is to be assigned to the company, and henceforth to become its property, the borrower being required, notwithstanding, to pay the monthly dues or premium upon the assigned stock until it is matured, which must, from the nature of the obligation, be to the time of the maturity of his own stock, when the loan is extinguished,—that is, the full time the loan remains unpaid in any part. Note its present operation. Defendant assigned to plaintiff thirty of his sixty shares of capital stock absolutely, as a premium bid in consideration of obtaining the loan of \$3,000, and pledged the balance of thirty shares as security for its payment. He was required to pay sixty cents per month denominated “dues” to the company, not only upon the thirty shares pledged, but also upon the thirty assigned to the company absolutely, being \$36 per month; but only one half, or \$18 per month, went to the reduction or the extinguishment of his loan, or was available to him for the accumulation of profits in the concern, the other half being a sheer contribution to the company. Aside from this, defendant was required to pay six per cent. on the amount of the loan, or \$15 per month, as interest. The result is that defendant was paying to the company \$18 per month, aside from the \$15 called interest, that is, \$33 per month, or 13.20 per cent., for the use of the \$3,000 advanced; so that ultimately the defendant paid in monthly installments towards said loan, during the time from November, 1891, to August, 1899, the sum of \$4,392, and yet plaintiff insists that the obligation is not discharged by \$831, leaving nearly a third

of it for which a decree is demanded. The scheme is a vicious one, and foreign to the operations of a legitimate building and loan or savings and loan association, and falls within the denunciation of this court: *Washington Invest. Assoc. v. Stanley*, 38 Or. 319 (84 Am. St. Rep. 793, 63 Pac. 489); *Western Sav. Co. v. Houston*, 38 Or. 377 (14 Am. & Eng. Corp. Cas. N. S. 710, 84 Am. St. Rep. 808, 65 Pac. 611). The pretended measure adopted for the bidding of a premium, and the regulation for the payment of dues on the stock assigned to the company therefor, is a subtle method for collecting interest by another name, and constitutes a shift or device for the cover of usury. This renders the transaction a loan merely, and the payments made, under whatsoever denomination, should go to its extinguishment, along with the interest reserved, under the holding in *Western Sav. Co. v. Houston*, 38 Or. 377 (84 Am. St. Rep. 808, 65 Pac. 611, 14 Am. & Eng. Corp. Cas. N. S. 710). These payments are more than sufficient to discharge the same in full, unless it be true, as contended by plaintiff, that, the contract being for money payable in the State of California, it is solvable by the laws of that state, where parties are permitted to contract for any rate of interest they may desire.

3. It is sound doctrine, no doubt, that a contract for the payment of money entered into *bona fide* in one place, and made payable in another, is to be construed, governed, and enforced according to the laws of the state or country where payable. But it is without application where there is a purpose manifest to avoid the laws of usury. Mr. Chief Justice TANEY, in a discussion of the subject, in *Andrews v. Pond*, 38 U. S. (13 Pet.) 65, 78, says: "The general principle in relation to contracts made in one place, to be executed in another, is well settled. They are to be governed by the law of the place of performance; and if the interest allowed by the laws of the place of performance is higher than that permitted at the place of contract, the parties may stipulate for the higher interest, without incurring the penalties of usury; but," continues the eminent jurist in another paragraph, "the same

rule cannot be applied to contracts forbidden by its (the place of contract) laws, and designed to evade them. In such cases, the legal consequences of such an agreement must be decided by the law of the place where the contract was made. If void there, it is void everywhere." So, in *Miller v. Tiffany*, 68 U. S. (1 Wall.) 298, 310, Mr. Justice SWAYNE, after stating the general rule and observing that the converse is also true, says: "These rules are subject to the qualification that the parties acted in good faith, and that the form of the transaction is not adopted to disguise its real character. The validity of the contract is determined by the law of the place where it is entered into." And in *De Wolf v. Johnson*, 23 U. S. (10 Wheat.) 367, it was held that the *lex loci contractus* must govern in a question of usury. See, also, *Holmes v. Manning* (Mass.), 19 N. E. 25. Usury is a moral taint wherever it exists, and no subterfuge should be permitted to conceal it from the eyes of the law. This, it is said, is the substance of all the cases. As a principle of international jurisprudence, no state is bound or ought to enforce or hold valid in its courts of justice any contract which is injurious to its public rights, offends its morals, contravenes its policy, or violates a public law: *Dickinson v. Edwards*, 77 N. Y. 573, 576 (33 Am. Rep. 671); 2 Kent, Comm. p. 458; *Varnum v. Camp*, 13 N. J. Law, 326 (25 Am. Dec. 476). It is scarcely controverted that plaintiff was doing business in this state. Indeed the fact is apparent from the minutes of plaintiff's board of directors, set out in the complaint, showing that loans were negotiated with persons resident within the state other than the defendant. Besides, plaintiff had a local advisory board, composed of its stockholders and members, and an agent in Albany, so that beyond question it was transacting business here, and was subject to the observance of the public laws and policy of the state, as much as any citizen thereof. Certainly, international or interstate comity does not go so far as to require the enforcement of a contract in favor of a nonresident doing business here that the courts of the state would not enforce in favor of one of its own citizens.

Now we have seen that the plaintiff, although pretending to be operating as a building and loan association, had adopted a plan or scheme not in accord with the true principles and purposes of that character of associations, with the manifest design of collecting interest by another name, and by deception to induce the payment of an unusual and unlawful rate. It is also manifest that the defendant Hill applied to become a member of the company, not that he especially desired to be a member and stockholder thereof, but solely for the purpose of obtaining a loan under the conditions offered. So it is perfectly reasonable and altogether natural to conclude that the stipulation for payment in San Francisco was introduced into the contract to avoid the usury laws of this state. A contract of the kind consummated with such a purpose, is an evasion of our laws, and contrary to the declared policy of the state, and cannot receive the sanction of this court. But, aside from this, there is very little to distinguish the case from that of *Washington Invest. Assoc. v. Stanley*, 38 Or. 319 (84 Am. St. Rep. 793, 63 Pac. 489). There the association had conformed to the act of 1895, and appointed a resident attorney, become duly licensed to contract business in the state, and had a solicitor residing where the loan was negotiated. In the present case, the plaintiff was transacting business here, as it had a right to do, but it had an agent and local board here composed of its resident members, appointed under the by-laws and usages of the association, whose functions it was to promote the membership thereof, and approve its loans. The bond and mortgage were executed by citizens of the state, realty situated within the state was hypothecated as security, and the money used in business here; so we must conclude that, notwithstanding the express stipulation that the bond was payable in San Francisco, the contract is solvable by the laws of this jurisdiction. We have not overlooked the cases of *Bedford v. Eastern Bldg. & L. Assoc.* 181 U. S. 227 (21 Sup. Ct. 597), and *Dygert v. Vermont L. & Trust Co.* 37 C. C. A. 389 (94 Fed. 913), but in each of these cases the *bona fides* of the transaction seems to have been unquestioned, and the point of controversy was re-

solved to the general proposition that a contract made in one state, which, by its terms, is payable in another, is to be controlled by the laws of the state where payable.

These considerations affirm the decree of the court below, and it is so ordered. **AFFIRMED.**

Decided 16 August, 1901.

DUNNE v. PORTLAND STREET RAILWAY CO.

[65 Pac. 1052.]

CREDITOR'S BILL—LIMITATION OF ACTION—RIGHT BY RELATION.

1. Where a creditor of an insolvent corporation files a creditor's bill against it, another creditor who subsequently makes himself a party, and proves his claim, is entitled by relation to the benefit of the suit as a party plaintiff from the beginning, and the time that elapses from the commencement of the suit to his becoming a party is not to be construed as a part of the time limited for the commencement of an action on his claim.

COMMENCEMENT OF ACTION—EFFECT OF APPEARANCE.

2. A suit or action is "commenced" so as to stop the running of the statute of limitations when the defendant enters a general appearance, without reference to the issuance of a summons.

From Multnomah: **JOHN B. CLELAND**, Judge.

Suit by David M. Dunne and others against the Portland Street Railway Company and others. From a decree in favor of complainants, defendants Fred R. Strong, as executor of the estate of Joseph Holladay, and George W. Weidler appeal.

AFFIRMED.

For Fred R. Strong as executor there was a brief and an oral argument by *Mr. James Gleason*.

For Geo. W. Weidler there was a brief and an oral argument by *Mr. Geo. G. Gammans*.

For respondents there was a brief over the names of *Coover & Stapleton, Ernest E. Merges, Chas. H. Carey, J. Couch Flanders, Williams, Wood & Linthicum*, and *Franklin P. Mays*, with an oral argument by *Messrs. Carey and Flanders*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

On July 7, 1894, the plaintiffs Kelly, Dunne & Company, for themselves and all other creditors of the Portland Street Railway Company, commenced this suit against the latter company, Joseph Holladay, Helen M. Halsey, William M. Ladd, and George W. Weidler, alleging in their complaint that they had recovered a judgment against the railway company for \$224.29, upon which execution had been issued and returned unsatisfied; that it was the owner of a franchise to operate its railway in the City of Portland, and for some time had been operating such railway at a loss; that it was largely indebted for taxes, and to divers and sundry creditors, including the plaintiffs, and was insolvent, and, unless a receiver was appointed, its franchise would be lost, and its property dissipated; that the defendants Holladay, Halsey, Ladd, and Weidler were stockholders of the corporation, and had not paid in full for the stock held by them; that it was necessary, for the protection of the creditors of the company, that a sale be made of all of its property, including the franchise, the amount of its debts be ascertained, and the stockholders required to pay in a sufficient sum, in addition to the proceeds of the sale, to liquidate the same. The prayer is for the appointment of a receiver to take charge and dispose of the property of the corporation under the direction of the court, and to apply the proceeds thereof to the payment of the taxes and the debts of the concern; that such debts be ascertained, and the stockholders required to pay into court a sufficient sum to satisfy any amount remaining due thereon after the application of the proceeds of the property. Due service of the complaint was accepted by Charles H. Carey, "attorney for defendants," and on the same day, "the plaintiffs appearing by their attorney, Cecil H. Bauer, and the defendant appearing by Charles H. Carey, Esq., its attorney," J. C. Epperly was appointed receiver, and directed to take charge of, and under the orders of the court to sell, the property of the corporation, and to manage its business. Mr. Epperly immediately qualified, and assumed the duties of receiver, and has ever since continued to act as such.

On December 16, 1898, other creditors were permitted to join as plaintiffs, and an amended complaint was filed, which, in addition to the allegations of the original complaint, avers that J. J. Allard performed services for the defendant corporation, as horseshoer, between November 1, 1890, and May 31, 1894, of the reasonable value of \$1,018, no part of which has been paid, except the sum of \$550; that between August 1, 1892, and January 31, 1894, Allard & Hagey, as partners, performed similar services, of the reasonable value of \$739, no part of which has been paid; that between October 11, 1890, and September 12, 1893, the plaintiffs Everding & Farrell sold and delivered to the railway company goods, wares, and merchandise of the reasonable value of \$8,689.72, no part of which has been paid, except the sum of \$7,930.54; that between May 9, 1891, and March 30, 1892, the plaintiffs R. & E. B. Williams and Charles H. Carey performed services as attorneys for the defendant company, of the reasonable value of \$1,038.40, no part of which has been paid; that, between the first day of January, 1893, and the first day of December, 1894, the plaintiff Charles H. Carey performed services for the company, of the reasonable value of \$500, no part of which has been paid. It also gives the names of all the stockholders of the corporation, the number of shares owned by each, and the amount paid thereon, and alleges the death of Joseph Holladay, and the appointment of Fred R. Strong as the administrator of his estate, and concludes with a prayer substantially the same as in the original.

After the amended complaint was filed, a summons was issued, and served upon the corporation and the other parties named as defendants. Afterwards the petitions of Thomas A. Gray, the Oregon Transfer Company, and Geo. W. Weidler, as receiver of the Willamette Steam Mill Lumbering & Manufacturing Company, to become plaintiffs, and by supplemental allegations set up their claims against the railway company, were allowed. Gray alleges that he served as secretary for the railway company, at its special instance and request, from the twenty-fifth of February, 1891, to January 9, 1899, the date

of verifying his complaint, at a salary of \$50 a month, amounting in the aggregate to \$4,700, no part of which has been paid. The transfer company avers that at various times between the eleventh day of November, 1890, and the second day of July, 1894, it rendered services, furnished supplies, and advanced moneys to the corporation, amounting in the aggregate to the sum of \$919.13, all of which is still due and payable. Weidler avers that between the fourth day of March, 1882, and the thirtieth day of June, 1894, the company of which he is receiver sold and delivered to the railway company goods, wares, and merchandise of the reasonable value of \$11,083.12, no part of which has been paid, except the sum of \$8,135.19. A demurrer to the amended complaint having been overruled, Strong, as administrator of the Holladay estate, Epperly, as receiver of the railway company, and Weidler personally, joined in an answer, in which they deny, on information and belief, the claims of the several creditors, and allege that the claims of Allard & Hagey, Everding & Farrell, Williams & Carey, Gray, Weidler, as receiver, and the Oregon Transfer Company accrued more than six years prior to the time the several claimants became parties to this suit. The new matter was put in issue by a reply, and, after hearing the evidence, the court found the amounts due the several creditors, as alleged by them, excepting Gray's salary for services as secretary after the appointment of the receiver, and that the only assets of the corporation with which to pay such indebtedness was the amount remaining unpaid on subscriptions to its capital stock; that Strong, as administrator of the Holladay estate, is the owner of one thousand two hundred shares of such stock, upon which there was due and unpaid the sum of \$90,250; that George W. Weidler is the owner of sixty-seven shares, upon which there was due and unpaid \$5,045.07, and rendered a decree against them jointly and severally, and in favor of the plaintiffs, for the respective amounts then due to the plaintiffs, but in the case of Weidler not to exceed in the aggregate the sum of \$5,040. From such decree the defendants Strong and Weidler appeal.

The only assignments of error on this appeal are: (1) The ruling of the trial court that no part of the claims of the intervening creditors is barred by the statute of limitations; and (2) in allowing Thomas Gray \$2,020 for services as secretary of the defendant corporation from the time of his election to that office, in February, 1891, to the appointment of the receiver in July, 1894.

1. In support of the first point, it is contended that the statute of limitations commences to run in favor of stockholders when the debts against the corporation mature. But it is unnecessary to consider that feature at this time. The original complaint, filed by Kelly, Dunne & Company on behalf of themselves and all other creditors, in July, 1894, was in the nature of a creditors' bill to obtain a judicial administration of the affairs of the insolvent corporation, and to enforce the personal liability of its stockholders, and is to be considered, therefore, as a suit on behalf of all the creditors of the company who should thereafter make themselves parties. In such a suit, a creditor making himself a party and proving his claim is entitled by relation to the benefit of the suit as virtually a party plaintiff from the beginning, and the time that elapsed from the commencement of the original suit to his becoming a party thereto will not be considered as a part of the time limited by the statute for the commencement of a suit or action on his claim. "A bill filed by one creditor, as plaintiff, in behalf of himself and others," says Mr. Angell, "will prevent the statute from running against any of the creditors who came in under the decree. Every creditor has, after the filing of a bill, an inchoate interest in the suit to the extent of its being considered as a demand, and to prevent his being shut out because the plaintiff has not obtained a decree within the six years": Angell, Lim. (5 ed.) § 331. This doctrine is recognized and enforced in cases similar to the one in hand by the Supreme Court of the United States in *Richmond v. Irons*, 121 U. S. 27 (7 Sup. Ct. 788), and of Ohio in *Barrick v. Gifford*, 47 Ohio St. 180 (21 Am. St. Rep. 798, 24 N. E. 259), and referred to by Mr. Thompson in his recent work on Corporations (3

Thomp. Corp. § 3771). It is unimportant, therefore, so far as the statute of limitations is concerned, at what time the intervening creditors become parties, if the original suit was commenced in time; for, as each creditor appeared and proved his claim, he had a right, as said in *Richmond v. Irons*, "to be considered as a party complainant from the beginning."

2. It is insisted, however, that the suit was not commenced, within the meaning of sections 14 and 15 of the statute (Hill's Ann. Laws), until the summons was served on the defendant corporation, December 16, 1898, after the amended complaint had been filed, and therefore all debts accruing six years prior to that time are barred by the statute. The record shows, however, that immediately upon the filing of the original complaint in 1894 an application was made for the appointment of a receiver, and on the hearing thereof the defendant appeared by "its" attorney, and a receiver was appointed, who subsequently took possession of all the property of the corporation, and managed and disposed of it under the direction of the court. Under these circumstances the contention that the court was without jurisdiction because the journal entry does not name the particular defendant for which Mr. Carey appeared seems rather technical. He was the attorney of the corporation at the time, and, whether the word "defendant" in the journal entry is a clerical error or not, his appearance was evidently intended to be for the corporation, and was deemed sufficient, both by it and the court, to warrant an order sequestering the property, business, and franchise of the corporation, and appointing a receiver, who operated the railway until the property was disposed of. We are of the opinion that Mr. Carey's appearance waived service of the summons upon the corporation, and that the suit was commenced, within the meaning of the statute, at the time of such appearance in 1894. There is no contention that any part of the claims involved in this suit accrued more than six years prior to that time; hence the plea of the statute of limitations was properly overruled.

There remains to be considered the objection to the claim of Mr. Gray. . On October 26, 1875, the board of directors of the

defendant corporation adopted a resolution, which has never been repealed, fixing the salary of the secretary of the company at \$50 a month. On the twenty-fifth day of February, 1891, Mr. Gray was elected secretary, and continued to serve in that capacity up to the time of his intervention in the suit. He had charge of the office of the company from the time of his election to the appointment of the receiver, received and paid out all the moneys due to and from it, and acted as treasurer and bookkeeper, and had general supervision of its office affairs. His own testimony, as well as that of Mr. Carey, the attorney of the company, and one of its directors, shows that, independent of the resolution of the corporation, his services were reasonably worth the amount allowed by the trial court. It is contended, however, that because he was secretary of, and received \$150 a month from, the Oregon Transfer Company during the same time, and Mr. Holladay was the controlling owner of that as well as of the railway company, the salary paid him by the former company was to cover his services as secretary of the latter. But there was no agreement to that effect, and we are unable to understand why the transfer company should be required to pay for services rendered to the railway company, unless it agreed to do so, or why Mr. Gray should be required to work for the railway company without compensation because he was receiving a salary for services rendered to another company. A point is made of the fact that he made no demand on the railway company for his salary on account of his services as secretary, but this circumstance is fully explained by the testimony, from which it appears that Mr. Holladay "had a peculiarity," and "always thought when pay day came it was ground to discharge a man" who insisted on payment, and therefore Gray preferred to allow his account as secretary of the railway company to stand, rather than jeopardize his position with the other company. We are of the opinion that there is no error in the decree of the court below, and it is therefore affirmed.

AFFIRMED.

Argued 4 December; decided 30 December, 1901.

PACIFIC BISCUIT COMPANY v. DUGGER.

[67 Pac. 32.]

GENERAL AND SPECIAL AGENCY—LIABILITY OF PRINCIPAL.

Where an agent is given full charge of a business, with power to sell and dispose of the stock and replenish it by purchasing new goods, the agency is general, though only for a special business; and a purchase on credit is within the scope of his apparent authority, for which defendant is liable, notwithstanding instructions not to purchase on credit.

From Linn: GEORGE H. BURNETT, Judge.

Action by the Pacific Coast Biscuit Company against G. A. Dugger, to recover the value of sundry goods sold by plaintiff and the Rosenfeld-Smith Company. There was a verdict and judgment for defendant, from which plaintiff appeals.

REVERSED.

For appellant there was a brief over the names of *Cannon & Newport*, and *Geo. W. Caldwell*, with an oral argument by *Mr. A. M. Cannon*.

For respondent there was a brief over the names of *J. J. Whitney* and *N. B. Humphrey*, with an oral argument by *Mr. D. R. N. Blackburn*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is an action to recover the value of goods, wares, and merchandise alleged to have been sold and delivered to the defendant. In March, 1899, the defendant purchased of her son a cigar and confectionery business in Independence, some miles distant from her home in Linn County. It was agreed that he should remain in general charge of the store as her agent, with authority to sell and dispose of the goods, and replenish the stock as it might be necessary, but he was instructed not to buy on credit. In October, November, and December, 1899, he purchased on credit of the traveling salesman of the plaintiff and

40	302
512	514
512	520

its assignors, who had no knowledge of his instructions, the merchandise mentioned in the complaint, which was received in the store, and either sold and disposed of by him in due course of business, or by the defendant a short time thereafter, when the stock was sold in bulk. Upon these facts, the single question presented is whether the defendant is liable for the goods so purchased by her son, and this depends upon whether he is to be regarded as a general or special agent. If his agency was special, the defendant is not liable, because he exceeded his authority; but, if general, his principal is bound, notwithstanding he acted contrary to her instructions. A general agent is one authorized to transact all his principal's business, or all his business of some particular kind, while a special agent is one authorized to do one or more specific acts in pursuance of particular instructions, or within restrictions necessarily implied from the act to be done: 1 Am. & Eng. Ency. Law (2 ed.), 985. Within these definitions, the defendant's son must be regarded as a general agent. The mere fact that his authority was confined to a particular business did not make him a special agent. He was given full charge and control of the business, with power to sell and dispose of the stock and replenish it by purchasing new goods; and therefore his principal is liable for his acts, within the scope of his apparent authority, notwithstanding he may have disregarded his secret instructions.

If a general agent disregards his instructions, his acts will nevertheless be binding on his principal, so far as third persons who deal with him without notice are concerned, although he may be personally liable to his principal therefor. This rule has been frequently applied by the courts to facts similar to those in hand. Thus, in *Drug Company v. Lyneman*, 10 Colo. App. 249 (50 Pac. 736), a drug business belonging to a married woman was conducted by her husband as general manager, and she was held liable for the goods purchased by him. although she told plaintiff's salesman that her agent must no longer buy goods of his company; it being assumed that, because the goods were delivered and mingled with the stock and

sold, the limitation on the authority of the agent had been withdrawn. In *White v. Leighton*, 15 Neb. 424 (19 N. W. 478), the defendant was carrying on a business through an agent, under an agreement that he was not to give orders for goods without the consent of his principal. The court held, however, that because the agent was in charge of the business, and held out to the world as having authority to do everything necessary to carry it on, his principal was liable for merchandise purchased by him of parties having no notice of the limitation of his authority. In *Palmer v. Cheney*, 35 Iowa, 281, the defendant was engaged in the mercantile business, which was under the control of her son as her general agent. The goods constituting the foundation of the plaintiff's claim were purchased by the son, received at the store, and sold as other goods were. The defendant was held to be liable, although she was present when the order was given, and directed her son, in the presence of the plaintiff's agent, to buy no more goods than he could pay for at the time. The court ruled that the fact that the goods were received at the store and disposed of by the defendant's agent amounted to a ratification of the contract of purchase, and that the instruction given by defendant to her agent to buy no more goods than he could pay for did not have the effect of limiting his authority, or depriving him of the character of a general agent. In *McDowell v. McKenzie*, 65 Ga. 630, it was held that a merchant whose agent purchased goods in New York on credit, although the credit was unauthorized, could not refuse to pay, when he had received and sold the goods and pocketed the proceeds. See, also, *Smith v. Holbrook*, 99 Ga. 256 (25 S. E. 627); *Webster v. Wray*, 17 Neb. 579 (24 N. W. 207); *Stapp v. Spurlin*, 32 Ind. 442; *Cruzan v. Smith*, 41 Ind. 288.

It follows from these views that the judgment of the court below must be reversed, and a new trial ordered. REVERSED.

Argued 13 February; decided 11 March, 1901.

NOSLER v. COOS BAY NAVIGATION CO.

[63 Pac. 1050, 64 Pac. 855.]

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42	571
40	305
46	428
47	59

APPEAL—STENOGRAPHER'S NOTES AS PART OF THE RECORD.

1. A transcript of the stenographer's notes of the trial are not part of the transcript on appeal and do not form part of the record before the supreme court, unless made a part of the bill of exceptions: *Reynolds v. Jackson County*, 33 Or. 422, cited.

BILL OF EXCEPTIONS—TRANSCRIPT OF PROCEEDINGS.

2. A document which consists of a copy of all the proceedings at a trial, with an order of court approving the copy and directing the clerk to attach it to the bill of exceptions, and which is so attached, is not a part of such bill, for it is not embodied therein, nor was it attached thereto when the bill was signed. An identification of a transcript of the stenographer's notes by the trial judge, with a direction to attach it to the bill of exceptions does not make such transcript a part of the bill: *Roberts v. Parrish*, 17 Or. 583, applied.

BILL OF EXCEPTIONS—STENOGRAPHER'S MINUTES.

3. Under Section 232, Hill's Ann. Laws, directing that a bill of exceptions shall set out the objections made with only so much matter as may be necessary to explain them, a transcript of all the proceedings during the trial is not a bill of exceptions: *MacMahon v. Duffy*, 36 Or. 150, applied.

SUPREME COURT—EFFECT OF MOTION.

4. Where the effect of granting a motion will be to leave the record in such a condition that the questions sought to be presented cannot be considered, the motion will be treated as one to affirm, and an order will be entered accordingly: *Fisher v. Kelly*, 26 Or. 240, cited.

APPEAL—EFFECT OF MOTION TO STRIKE BILL OF EXCEPTIONS.

5. Where an appeal was taken in the manner and within the time prescribed by law, and abstracts and briefs were filed as required by the rules of court, the appeal will not be dismissed, or judgment affirmed, on motion to strike the transcript because of defects in the bill of exceptions, since the jurisdiction of the court and the sufficiency of the complaint could be raised without a bill of exceptions, and a defective bill might be amended.

From Coos.

Action by J. T. Nosler, administrator of the estate of Matilda E. Nosler, against the Coos Bay, Roseburg & Eastern Railroad & Navigation Company. From a judgment in favor of the plaintiff, defendant appeals. A motion to strike out part of the record was granted and the judgment affirmed.

On rehearing the order was modified by eliminating the affirmance clause, but subsequently, on a second motion, the judgment was affirmed without an opinion. **AFFIRMED.**

ON MOTION TO STRIKE OUT PART OF THE TRANSCRIPT.

Mr. Edw. B. Watson, for the motion.

Mr. S. H. Hazard, contra.

PER CURIAM. This is a motion to strike from the files what purports to be a transcript of the stenographer's notes of the proceedings had at the trial in the court below from the impaneling of the jury to the rendition of their verdict, which covers three hundred and twenty-six pages of the printed abstract, and is designated as "Transcript of Trial," for the reason that it is not properly part of the record.

1. A transcript of the stenographer's notes of the trial of an action at law is no part of the record on an appeal to this court, unless made so by a bill of exceptions: *McQuaid v. Portland & Vanc. R. Co.* 19 Or. 535 (25 Pac. 26); *Reynolds v. Jackson County*, 33 Or. 422 (53 Pac. 1072).

2. Now, the bill of exceptions in this case simply recites the appointment of the stenographer, the fact that he took down in shorthand all the evidence given, offered, and received on the trial, all exceptions and objections made by the attorneys for the parties during the course of the trial, and the instructions of the court, and other proceedings connected therewith; that he transcribed his notes into longhand in due form, and entitled the same "Transcript of Trial," and certified and filed it with the clerk. Then follows an order of the court, "that said transcript of trial, so made by said W. U. Douglas, and so filed in said court, be, and the same hereby is, made a part of this bill of exceptions, the same as if it were copied therein; and the clerk of this court is hereby ordered and directed, in making a transcript of this action for appeal to the supreme court, to make a copy of said transcript of trial so made by W.

U. Douglas, and to attach the same to this bill of exceptions as a part thereof." It then proceeds to recite that "such transcript of trial has been examined and approved as correct, except as hereinafter changed or modified." Then follows a reference by pages and questions to certain matters that occurred during the trial, and certain explanations are made in reference thereto, but the bill does not contain, or purport to contain, the statement of any objection or exception, "with so much of the evidence or other matter as is necessary to explain it," as required by Section 232, Hill's Ann. Laws. In *Roberts v. Parrish*, 17 Or. 583 (22 Pac. 136), it was held that, although a bill of exceptions recited that a certain deposition was made a part thereof, it was insufficient to present for consideration any alleged errors relating to matters contained in such deposition. The court, speaking through Mr. Justice STRAHAN, said: "To become a part of the record, it (the deposition) must be either copied into the bill of exceptions, or attached to the same as an exhibit, and marked so that the same may be identified. * * * What is claimed to be the deposition of the plaintiff in this case is not even attached to the bill of exceptions, but is copied, and sent up with a large mass of other useless matter. We cannot, therefore, determine whether the answers to those questions were prejudicial to the appellant or not." This decision would seem to be controlling, so far as the present motion is concerned. In the case at bar, the transcript of the trial was copied, and sent up by the clerk, but it was not embodied in or attached to the bill of exceptions at the time it was signed. Under the statute and practice in some jurisdictions, an authentication by the trial judge of the transcript of the stenographer's notes, with a direction by him that it shall be considered a part of the bill of exceptions, is sufficient to make it so: 3 Ency. Pl. & Pr. 436. But such has never been the practice in this state, nor is it authorized by the statute. The reporter's notes contain material for, but do not constitute, a bill of exceptions; nor can they be made such by any certificate of identification the trial judge might make.

3. And, even if what purports to be a transcript of the ste-

nographer's notes had been copied into the bill of exceptions, or attached thereto, and made a part thereof, it would still not conform to the requirements of the statute. Section 230 defines an exception, and section 231 points out the method of making the same a part of the record so as to present a question for review in this court; and we have repeatedly held that these provisions of the statute must be observed, and have refused to search through a mere transcription of the shorthand notes of the trial for the purpose of ascertaining whether it showed error or not. The court has spoken so often on this question that we need do nothing more at this time than refer to the decisions: *Janeway v. Holston*, 19 Or. 97 (23 Pac. 850); *Eaton v. Oregon Ry. & Nav. Co.* 22 Or. 497 (30 Pac. 311); *O'Connor v. Van Hoy*, 29 Or. 505 (45 Pac. 762); *Reynolds v. Jackson County*, 33 Or. 422 (53 Pac. 1072); *MacMahon v. Duffy*, 36 Or. 150 (59 Pac. 184). So that we conclude the motion in this case is well taken, and, as the questions sought to be presented on the appeal can only be made to appear by a bill of exceptions, the motion will be treated as for an affirmance, and the judgment will be affirmed accordingly: *Fisher v. Kelly*, 26 Or. 249 (38 Pac. 67). AFFIRMED.

Decided 4 May, 1901.

ON MOTION FOR REHEARING.

PER CURIAM. Generally speaking, an appeal should not be dismissed or judgment affirmed in advance of a hearing in its order on account of a defective bill of exceptions, or even a want thereof: 2 Ency. Pl. & Pr. 346; 3 Ency. Pl. & Pr. 511; *Corder v. Speake*, 37 Or. 105 (51 Pac. 647). The jurisdiction of the court, the sufficiency of the complaint, and perhaps other questions, can be raised on appeal without such a bill. Moreover, a bill of exceptions, which, through inadvertence or mistake, has been incorrectly made up, may, by order of the trial court entered *nunc pro tunc* on proper notice be so amended as to make it conform to the facts, even though an appeal is pending: *State ex rel. v. Estes*, 34 Or. 196 (51 Pac. 77, 52 Pac.

571, 55 Pac. 25). When, therefore, an appeal has been taken in the manner and perfected within the time allowed by law, and the rules of this court in the matter of filing abstracts and briefs have been complied with, it ought not to be dismissed or affirmed on motion because of some defect in the bill of exceptions.

Upon the other points the petition is without merit. The acts authorizing the appointment of official reporters have not, in our opinion, changed or modified the law in reference to bills of exception and the settlement thereof. The only way to make oral matter or oral evidence in a law action a part of the record is by incorporating it into a bill of exceptions, or by annexing it thereto as an exhibit, and thus making it a part thereof. The portion of the order affirming the judgment, being technically erroneous, will therefore be vacated, and a rehearing denied.

AFFIRMED; REHEARING DENIED.

Decided 16 December, 1901.

STATE EX REL. v. DOWNING.

[58 Pac. 863; 66 Pac. 917.]

40 309
47 382

APPEALABLE ORDER.

1. Where a court intends to finally pass upon all the questions at issue in a pending case, and make a concluding adjudication respecting them, without intending to hold the matter under further consideration, the order thus entered is a "final order," within the meaning of Section 535 of Hill's Ann. Laws, from which an appeal may be taken: *Harvey's Heirs v. Watt*, 10 Or. 117, applied. Thus, an order adjudging a person guilty of contempt and fixing his punishment is a final and appealable order, notwithstanding an additional clause that further proceedings be stayed until the further order of court, and that defendant have a stated time within which to prepare a bill of exceptions, the effect of this last clause being only to stay the enforcement of the order.

JUDGMENT OF CONTEMPT—NECESSITY OF WARRANT.

2. A judgment of contempt is not self-executing under the statutes of Oregon, but must be enforced by means of a warrant of commitment, which is to issue at the order of the court.

SUPPLEMENTAL PROCEEDINGS—POWER TO MAKE FINAL ORDER.

3. Under Section 308 of Hill's Ann. Laws, providing that after the issuing of an execution, and on proof to the satisfaction of the court or judge thereof that the judgment debtor has property liable to execution which he refuses to apply toward the satisfaction of the judgment, such court or judge may by an order require the judgment debtor to appear and answer, under oath

concerning the same; and section 309, providing that if it appears by the examination of witnesses that the judgment debtor has any property liable to execution, the court or judge shall make an order requiring the judgment debtor to apply the same in satisfaction of the judgment; the preliminary order for the examination of the judgment debtor may be made by the judge, and the final order requiring the satisfaction of the judgment may be made by the court.

EFFECT OF FAILURE OF DEBTOR TO APPEAR BEFORE REFEREE.

4. The failure or refusal of the judgment debtor to appear before a referee for examination regarding property that he may have liable to execution, pursuant to an order issued under the authority conferred by Section 308 of Hill's Ann. Laws, does not affect the validity of any order that such referee may make under section 309.

SUPPLEMENTAL PROCEEDINGS—LEVY ON TANGIBLE PROPERTY.

5. A judgment creditor is not required to levy on and sell tangible property of the judgment debtor before invoking the aid of supplemental proceedings under Section 308 of Hill's Ann. Laws, as the statute authorizes such proceedings on the issuing of an execution and proof that the judgment debtor has property subject to execution which he refuses to apply toward the satisfaction of the judgment.

NECESSITY FOR PRIOR SALE OF ATTACHED PROPERTY.

6. The statement in the affidavit in proceedings supplemental to execution that the judgment debtor had property liable to execution which he refused to apply toward the satisfaction of the judgment, if believed by the court or judge, is sufficient to authorize the issuance of an order requiring the judgment debtor to appear for examination and to satisfy the judgment, notwithstanding an attachment of tangible property without levy of execution thereon.

FORCE OF VOIDABLE ORDER—CONTEMPT.

7. While it is true that one cannot properly be punished for disobeying a void order, it is also true that one can and ought to be punished for disobeying a voidable order; for voidable orders are in force until they are set aside in a proper proceeding: thus, if it be admitted that an order directing a judgment debtor to appear for examination in supplemental proceedings is voidable, that will not relieve him from contempt proceedings for a failure to comply therewith, where the court had jurisdiction of the proceedings at their inception.

TITLE OF CIVIL CONTEMPT CASE—AMENDING TITLE.

8. Under Section 655 of Hill's Ann. Laws, a contempt proceeding in a case not of public interest should be conducted in the name of the state on the relation of the party interested, and where such a proceeding has not been so entitled, it is discretionary with the trial court, under Section 101 of Hill's Ann. Laws, to allow an amendment before trial changing the title by substituting the State ex rel. as plaintiff.

SUPPLEMENTAL PROCEEDINGS—APPEAL—STAYING EXECUTION.

9. An appeal from an order in supplemental proceedings requiring the judgment debtor to satisfy the judgment will not operate as a stay of such proceedings, in the absence of an undertaking by the judgment debtor for the satisfaction of so much of the order as may be affirmed, since the order is so closely connected with the judgment as to be a part thereof, and fall within the meaning of Hill's Ann. Laws, § 538, subd. 1, which requires that in order

to stay proceedings on a money judgment, there must be an appeal supported by an undertaking to satisfy the judgment if affirmed.

CONTEMPT—CONTENTS OF AFFIDAVIT—AIDER BY ANSWER.

10. An affidavit filed as the basis of a proceeding for a contempt not committed in the presence of the court should show the facts constituting the contempt, that the order that has been disobeyed had been served on the defendant or that he had personal knowledge or notice of it, and that a demand to comply with such order had been made by some person authorized to require such compliance; but the want of some of or all these allegations may be supplied by the answer, in which case the defect is cured.

NEGATIVE PREGNANT EVIDENCE.

11. The negative pregnant rule is as applicable to evidence as to pleading, and the same result follows its enforcement; thus, where the point in issue was the ability of a person to pay a judgment for \$7,817, his evidence that he had not had and had not at the time of testifying \$10,000 in lawful money, was an admission that he had a less sum, and justified a finding that he could pay the judgment if he would.

CONTEMPT—EFFECT OF REVERSING DISOBEYED ORDER.

12. The effect of a reversal of an order for disobedience of which a person has been adjudged guilty of contempt is to relieve such person from the duty of obeying the order, but it does not remit any fine that may have been imposed.

From Multnomah: ALFRED F. SEARS, JR., Judge.

A contempt proceeding having been instituted against F. O. Downing for not obeying an order of court, he was adjudged guilty, and from this order he appeals. Further facts appear in the opinions. A motion to dismiss the appeal was overruled, opinion by Judge Wolverton, and the case was heard on its merits and affirmed, opinion by Judge Moore.

AFFIRMED.

Decided 6 November, 1899.

ON MOTION TO DISMISS APPEAL.

Messrs. Coover & Stapleton, and Watson & Beekman, for the motion.

Messrs. Woodward & Palmer, contra.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

On October 7, 1897, the relator, Thomas J. Hammer, obtained a judgment in the Circuit Court of the State of Oregon for Multnomah County against the appellant, F. O. Downing,

and one F. H. Hopkins, as partners under the firm name of Downing, Hopkins & Company, for \$7,817.50, with accruing interest and costs. On April 4, 1898, it appearing in a proceeding supplemental to execution that Downing had \$10,000 in his possession and under his control liable to execution upon said judgment, which he unjustly refused to apply towards the payment of the same, the court made an order directing him to pay over a sufficient amount thereof to satisfy said judgment, from which order and judgment he appealed to this court, but proceedings for their enforcement were not thereby stayed. Subsequently, on June 30, 1898, a proceeding for contempt of court in refusing to comply with the said order of April 4, 1898, was instituted against him, wherein the court made findings, and entered thereupon the following order and judgment, viz.: "It is therefore ordered and adjudged by the court that the defendant, F. O. Downing, is guilty of contempt of this court, as charged in said affidavit of Thomas J. Hammer, the relator herein, and is now in contempt of this court for disobedience to its said order of the fourth day of April, A. D. 1898, and that it is in his power to comply therewith; and that said defendant, F. O. Downing, pay a fine of twenty-five dollars and costs of this proceeding, and be imprisoned in the county jail of Multnomah County, State of Oregon, until he shall have complied with said order of the fourth day of April, A. D. 1898, by applying a sufficient portion of said sum of ten thousand dollars upon said judgment in favor of said Thomas J. Hammer, mentioned in said order, to satisfy the same, namely, the sum of \$7,817.50, with interest thereon from July 15, 1897, at the rate of eight per cent. per annum, and until said fine is paid. And on the motion of said defendant, F. O. Downing, it is further ordered that all further proceedings herein be stayed until the further order of the court, and that said defendant have sixty days to file a bill of exceptions." The defendant, Downing, having appealed from the judgment without attempting to have the proceedings stayed, the relator moves to dismiss the appeal for the reason that the order or judgment is not final, and therefore not appealable.

1. It is maintained by the relator that the latter clause of the judgment, which directs that all further proceedings be stayed until the further order of the court, retains the cause within the breast of the court below, so that it is empowered to modify or set aside and annul the judgment at any time upon further hearing, and, therefore, that the judgment is not final in its nature and purpose, so that an appeal would lie therefrom. On the other hand, it is contended that the subjoined clause is effective only for the purpose of staying the issuance of a commitment and the enforcement of the judgment under and by virtue thereof; that it is rather in the nature of a stay of execution than a withholding of a final conclusion and adjudication upon the matters in controversy. The proceeding for contempt is one regulated entirely by statute, which provides—omitting a statement of the specific mode of procedure prescribed—that, upon the evidence taken as contemplated, the court or judicial officer shall determine whether or not the defendant is guilty of the contempt charged, and, if it be determined that he is guilty, he shall be sentenced to be punished as provided by such statute; and further, that, when the contempt consists in the omission or refusal to perform an act in the power of the defendant to perform, he may be imprisoned until he shall have performed it, and in such case the act must be specified in the warrant of commitment. From the judgment thus given and entered either party thereto may appeal “in like manner and with like effect as from the judgment in an action”: Hill’s Ann. Laws, §§ 651, 659, 661, 664. Now, the judgment in the case at bar has determined that the defendant was guilty of contempt, and it specifies in what particular it consists. It is further adjudged that he pay a fine and the costs of the proceeding, and that he be imprisoned in the county jail until he shall have complied with the previous order of the court. This judgment conforms to every requirement of the statute, and without the latter clause no one would question that it was final in its nature and effect. The rule seems to be that, where it is the purpose of the court to pass upon all the questions at issue, and to finally consider

and determine concerning them, and make and enter a concluding order respecting them, without any intention of holding the matter in abeyance so that it may subsequently modify or revoke the order, the judgment so entered will be deemed to be final: *Harvey's Heirs v. Wait*, 10 Or. 117. And this is just what the court in the present case undertook and intended to do. It was its purpose, undoubtedly, to dispose of the case absolutely, so far as adjudging the defendant in contempt is concerned; and when it had entered the judgment in this regard that ended its jurisdiction to modify or vacate the same, unless for good cause shown within the statutory provisions. The purpose of the subjoined clause, about which the contention centers, was, no doubt, to stay the execution of the judgment only, and not to reserve judgment.

2. The act establishing the proceeding contemplates that the judgment shall be enforced by means of a warrant of commitment, which stands in the stead of an execution upon the ordinary judgment. The defendant cannot be committed except by authority of a warrant. The judgment is not self-executing; hence the order staying further proceedings is one in effect staying the enforcement of the judgment by withholding the warrant of commitment. This view of the law supports the appellant's right to appeal, and the motion to dismiss is therefore denied.

MOTION OVERRULED.

Decided 16 December, 1901.

ON THE MERITS.

MR. JUSTICE MOORE delivered the opinion.

This is a special proceeding by the State of Oregon, on the relation of Thos. J. Hammer, to punish F. O. Downing for a constructive contempt in disobeying an order of the circuit court for Multnomah County requiring him to apply certain money found by the court to be in his possession to the satisfaction of a judgment against him and another in favor of Hammer. It was instituted June 30, 1898, by filing an affidavit of which the following is a copy, to wit:

THOMAS J. HAMMER,
Plaintiff.

v.

F. O. DOWNING and F. H.
HOPKINS, partners, styled
DOWNING & HOPKINS,
Defendants.

STATE OF OREGON, COUNTY OF MULTNOMAH: SS.

“I, Thomas J. Hammer, being first duly sworn, say that I am the plaintiff in this action; that on the 29th day of October, 1897, a judgment in the above entitled action was entered in favor of plaintiff and against the defendants in the sum of \$7,617.50, with interest from July 15, 1897, at 8 per cent. per annum, and \$141.30 costs and disbursements, and upon the same day the said judgment was docketed in the lien docket in the clerk's office in this court, and is now a valid and existing judgment; that on the 24th day of November, 1897, an execution upon said judgment was duly issued, but that the same was wholly unsatisfied, and is to-day wholly unsatisfied and unpaid; that by order of the above court duly issued December 4, 1897, and by a further order issued December 20, 1897, upon proceedings supplemental to execution, J. R. Stoddard, Esq., was duly appointed by this court referee to take testimony and report the same to this court, together with his findings of fact and conclusions of law; that upon December 29, 1897, the report of the said referee, containing all testimony taken by him, together with his findings of fact and conclusions of law, were duly filed in this court; that said report found that on September 1, 1897, and at the time of making and filing said report, defendant F. O. Downing was the owner and in possession of \$10,000 in money in Multnomah County, Oregon, which said money was liable to the execution upon the judgment herein; that said referee found as a conclusion of law that said defendant be required to pay said \$10,000, or as much thereof as may be necessary to satisfy said judgment, within ten days from the entry of judgment therein, said report of said referee being especially referred to herein and made a part of this affidavit, as the same appears in the record in this cause; that upon April 4, 1898, this court duly confirmed the report of the said referee, and entered judgment and order herein that the said defendant F. O. Downing, on or before April 16, 1898, apply said sum of \$10,000, or so much thereof as may be necessary, in satisfaction of the said judgment of plaintiff; that the said F. O. Downing has failed and refused

to comply with said order, and has paid upon said judgment no part of the same, and the whole thereof is now due, owing, and unsatisfied, and, unless the said Downing is compelled to pay the same on said order, the said judgment will be wholly lost to the plaintiff; that said F. O. Downing has no other property on which execution may be levied. Wherefore, affiant prays that said defendant F. O. Downing be ordered to appear before this court to show cause why he should not comply with said order or be punished for contempt.

“THOS. J. HAMMER.

“Subscribed and sworn to before me this June 29th, 1898.

“E. E. COOVERT, Notary Public for Oregon.”

Thereupon an order was issued requiring the defendant to appear in said court on July 7, 1898, to show cause why he should not be punished for contempt. At the time so appointed the defendant appeared and demurred on the ground that the court had no jurisdiction to make said order, and that the affidavit on which it was based does not state facts sufficient to warrant the court in making it. The demurrer being overruled, the defendant, on August 8, 1898, interposed another on the ground that there was a defect of parties plaintiff, in that the State of Oregon was not named as a coplaintiff; and this demurrer being also overruled, an answer was filed November 26, 1898, admitting that on April 4, 1898, the court made an order wherein Downing was required on or before April 16, 1898, to apply the sum of \$10,000, or so much thereof as might be necessary, in satisfaction of a judgment rendered October 29, 1897, in favor of Hammer and against Downing, Hopkins & Company. It is also alleged that at the time said action was commenced a writ of attachment was issued, in pursuance of which certain property of the defendants was attached, and by the judgment ordered sold, but no execution had been levied thereon; that Downing was also the owner of other property, which, together with that so attached, was amply sufficient to satisfy said judgment; that the order in the proceedings supplemental to execution, upon which the order herein is based, is not supported by evidence, but is based upon a presumption of fact not applicable thereto. The

allegations of new matter in the answer having been denied in the reply, the plaintiff, by leave of the court, amended the title by making the State of Oregon a party plaintiff. At the trial testimony was taken from which the court found that the defendant was guilty of contempt in disobeying the order of April 4, 1898, and that it was then in his power to comply therewith, and thereupon adjudged that he pay a fine of \$25 and costs, and be imprisoned in the county jail of said county until he complied with the order by applying said sum of \$10,000, or sufficient thereof to satisfy judgment, interest, and costs, and Downing appeals.

3. It is contended by appellant's counsel that the court had no jurisdiction of the subject-matter, and no authority to issue the order of April 4, 1898, because, the order requiring the judgment debtor to appear before the referee having been made by the judge at chambers such judge only could issue a final order requiring Downing to satisfy the judgment, and that the final order, having been made by the court, is void. The statute (Hill's Ann. Laws) prescribing the mode of compelling the satisfaction of judgments in proceedings supplemental to execution, as far as deemed applicable herein, is as follows:

Section 308. "After the issuing of an execution against property, and upon proof by the affidavit of the plaintiff in the writ, or otherwise, to the satisfaction of the court or judge thereof, that the judgment debtor has property liable to execution, which he refuses to apply towards the satisfaction of the judgment, such court or judge may, by an order, require the judgment debtor to appear and answer under oath concerning the same, before such court or judge, or before a referee appointed by such court or judge, at a time and place specified in the order."

Section 309. "On the appearance of the judgment debtor, he may be examined on oath concerning his property. His examination, if required by the plaintiff in the writ, shall be reduced to writing, and filed with the clerk by whom the execution was issued. Either party may examine witnesses in his

behalf, and if by such examination it appear that the judgment debtor has any property liable to execution, the court or judge before whom the proceeding takes place, or to whom the report of the referee is made, shall make an order requiring the judgment debtor to apply the same in satisfaction of the judgment, or that such property be levied on, by execution, in the manner and with the effect as provided in Title I of this chapter, or both, as may seem most likely to affect [effect] the object of the proceeding.”

It was held in New York, in construing a statute of similar import, that a preliminary order for the examination of the debtor might be granted by a judge at chambers, and, the proceedings being special in character, and designed to afford the creditor a speedy and efficient remedy against a dishonest debtor, they were to be controlled by the officer before whom they were instituted: *Hulsaver v. Wiles*, 11 How. Prac. 446. The statute construed in that case provided, in effect, that, when an execution against the property of a judgment debtor is returned unsatisfied in whole or in part, the judgment creditor is entitled to an order from a judge of the court, or a county judge of the county to which the execution was issued, or a judge of the court of common pleas for the city and county of New York, when the execution is issued to such city and county, requiring the judgment debtor to appear and answer before such judge, at a time and place specified in the order, within the county to which the execution was issued: How. Code, N. Y. § 292. Our statute, it will be observed, is much broader than that of New York, and evidently framed so as to give the court or judge sufficient authority to issue a preliminary order requiring the judgment debtor to appear and answer concerning his property at a time and place specified in the order; and if, upon such examination, it satisfactorily appear that the debtor has property liable to execution, the judge is vested with plenary power to issue the final order, requiring him to apply the same in satisfaction of the judgment, or that the execution be levied on such property; and the same measure of power is also conferred upon the court.

The only restriction, as we view the statute, is that if the preliminary order be made, as in this instance, by the judge, the final order, if made in vacation or at chambers, must also be issued by the same authority; for a judge may exercise out of court all the powers expressly conferred upon such officer, as contradistinguished from a court, and not otherwise: Hill's Ann. Laws, § 915. It was also held at one time in New York, in construing a similar statute, that the judge who made the order for the examination of the judgment debtor was the only power authorized to punish the debtor for disobedience in failing to attend at the time and place appointed for his examination: *Shepherd v. Dean*, 3 Abb. Prac. 424. A different conclusion, however, was reached in *Wicker v. Dresser*, 13 How. Prac. 331, where it was held that the court, as well as the judge, has power to punish for contempt in proceedings supplemental to execution. When the preliminary order initiating the proceedings is made by the judge, we do not think a reasonable construction of the statute prohibits the court from issuing the final order requiring satisfaction of the judgment.

4. It is contended that, because the judgment debtor did not appear before the referee as directed, the order requiring him to satisfy the judgment is void. It will be remembered that the statute (Section 309, Hill's Ann. Laws) provides that, on the appearance of the judgment debtor, he may be examined on oath concerning his property. It is nowhere provided that upon his failure or refusal to obey the requirement of the preliminary order the jurisdiction is ousted, or the authority of the court or judge suspended. If such a result were a rule of procedure, the judgment debtor would have power to delay the enforcement of a judgment indefinitely, though he might possess ample intangible property with which to satisfy the sum adjudged against him. He cannot be examined unless he appears at the time and place appointed for that purpose; but the statute, having prescribed that either the judgment creditor or debtor may examine witnesses in his behalf, has provided a method whereby the creditor may ascertain what property the debtor possesses liable to execution, though the latter disobeys

the order requiring him to appear for examination, thereby rendering himself liable to punishment for contempt. Any other construction of the statute (Sections 308 and 309, Hill's Ann. Laws) would render its provisions idle and give a dishonest debtor power to defeat the remedial provisions evidently intended by the legislative assembly as a summary method of compelling him to satisfy judgments rendered against him out of property that cannot be found or reached by the officer in possession of the execution. Downing's nonappearance did not defeat or suspend the power to conduct the examination in his absence.

5. It is contended that the affidavit upon which the preliminary order was based stated facts which negated the right to require the judgment debtor to appear for examination concerning his property liable to execution, and, this being so, the order requiring him to apply any property claimed to have been in his possession in satisfaction of the judgment is void. The affidavit referred to stated that the sheriff, to whom the execution was delivered for service, was unable to find any property belonging to either of the defendants out of which he could make more than a small part of the sum due on the judgment. It is argued that, before the judgment creditor is entitled to invoke the aid of proceedings supplemental to execution, he must levy upon and sell the tangible property of the judgment debtor that is liable thereto. The statutes of many of the states contain such provisions, but ours does not,* and the only requisite necessary to this ancillary remedy is the issuing of an execution against property and proof by the affidavit of the plaintiff in the writ that the judgment debtor has property liable to execution which he refuses to apply toward the satisfaction of the judgment.

6. It is maintained that after the original action was commenced by Hammer, in which he recovered the judgment that forms the basis of the proceedings supplemental to execution, certain property was attached which by the court was ordered

*See Section 308.

to be sold; and, no execution having been levied thereon, the order requiring Downing to appear for examination, and also the order requiring him to satisfy the judgment, are void. It may be that the sheriff, in pursuance of the command of the execution ordering the property so attached to be sold to satisfy the judgment, would have been obliged to make such sale before he could sell other property; but, however this may be, the mere statement in the affidavit that the judgment debtor had property liable to execution which he refused to apply toward the satisfaction of the judgment, if believed by the court or judge, was sufficient to authorize the issuance of the orders complained of, notwithstanding the attachment. What has been said respecting the attachment applies with equal force to the contention that the judgment debtor having sufficient tangible property subject to execution by the sale of which the judgment might be satisfied renders the order requiring him to satisfy the same void.

7. It is insisted that the final order of April 4, 1898, requiring Downing to satisfy the judgment, was not based upon findings of fact competent to support it, but by invoking a disputable presumption that was not applicable thereto, thereby rendering said order void. It has just been decided in the case of *Hammer v. Downing*, 41 Or. — (66 Pac. 916), in the proceedings supplemental to execution, that the order was erroneously issued; but this does not render it void. While a party cannot be punished for disobeying a void order (*Brown v. Moore*, 61 Cal. 432; *Ruhl v. Ruhl*, 24 W. Va. 279), the rule is universal that a voidable order must be obeyed until it has been set aside in a proper proceeding instituted or prosecuted for that purpose [*Ex parte Spencer*, 83 Cal. 460 (23 Pac. 395, 17 Am. St. Rep. 266); *In re Cohen*, 5 Cal. 494; *People v. O'Neil*, 47 Cal. 109; *Lutt v. Grimont*, 17 Ill. App. 308; *Keenan v. People*, 58 Ill. App. 241; *State v. Horner*, 16 Mo. App. 191; *Forrest v. Price*, 52 N. J. Eq. 16 (29 Atl. 215)]. Mr. Justice ALLEN, in *People v. Bergen*, 53 N. Y. 404, speaking of a similar order, said: "If it was improvidently or erroneously granted,

the remedy of the party aggrieved was by application to vacate it or by appeal. It is not void, and it cannot be reviewed upon an application to punish for a disobedience of it. So long as it remains in force, the duty of all parties is to obey it, and the merits of the order are not reviewable." The want of jurisdiction, such as will justify the disobedience of an order of court, must be manifest from an inspection of the proceedings at their inception, and not such as develops during the hearing: *Ex parte Wimberly*, 57 Miss. 437; *Forrest v. Price*, 52 N. J. Eq. 16 (29 Atl. 215); *People v. Bergen*, 53 N. Y. 404. The court had jurisdiction of the proceedings supplemental to execution at their inception, and the issuance of a voidable order therein affords no justification for a disobedience thereof: *Rapalje, Contempt*, § 33.

8. It is contended that the court never acquired jurisdiction of the subject-matter of the contempt proceedings, because they were not instituted in the name of the proper party plaintiff, and hence the order imposing the fine and punishment is void. The statute prescribing the method of procedure in such cases provides as follows: "In the proceeding for a contempt, the state is plaintiff. In all cases of public interest, the proceeding may be prosecuted by the district attorney, on behalf of the state; and in all cases where the proceeding is commenced upon the relation of a private party, such party shall be deemed a coplaintiff with the state": Hill's Ann. Laws, § 655. A civil contempt is a disobedience by a party of the order of a court or judge, made for the benefit or advantage of another party to the proceedings: *Rapalje, Contempt*, § 21; *State v. Knight*, 3 S. D. 509 (54 N. W. 412, 44 Am. St. Rep. 809); *Welch v. Barber*, 52 Conn. 147 (52 Am. Rep. 567); *People ex rel. v. Court of Oyer and Terminer*, 101 N. Y. 245 (4 N. E. 259, 54 Am. Rep. 691); *Rawson v. Rawson*, 35 Ill. App. 505; *Ex parte Robertson*, 27 Tex. App. 628 (11 S. W. 669, 11 Am. St. Rep. 207). A criminal contempt consists in disrespect of the court or disobedience of its process, whereby the administration of justice is obstructed, or in any act or language of a person which tends to bring the court into dis-

respect: *State ex rel. v. Conn*, 37 Or. 596 (62 Pac. 289); *People ex rel. v. Court of Oyer and Terminer*, 101 N. Y. 245 (4 N. E. 259, 54 Am. Rep. 691); *Wyatt v. People*, 17 Colo. 252 (28 Pac. 961); *State v. Gilpin*, 1 Del. Ch. 25; *Ex parte Robertson*, 27 Tex. App. 628 (11 S. W. 669, 11 Am. St. Rep. 207); *Ruhl v. Ruhl*, 24 W. Va. 279; *In re Murphey*, 39 Wis. 286. In *Wyatt v. People*, 17 Colo. 252 (28 Pac. 961), Mr. Justice HELM, in speaking of the division of contempts, says: "The foregoing classification is not affected by the fact that the procedure is in most instances substantially the same, whether the contempt be civil or criminal; nor is the character of the contempt in this regard controlled by the character of the court in which it occurs. For centuries courts clothed with civil jurisdiction only have investigated and punished those contempts which are classified as criminal." It has been held that motions and affidavits for the attachment of the person in civil suits are proceedings on the civil side of the court until the writs for their apprehension issue, and are to be entitled with the names of the parties; but thereafter, when the question of contempt arises therein, the proceedings are on the criminal side: *United States v. Wayne*, 28 Fed. Cas. No. 16,654, Chancellor WALWORTH, in *Stafford v. Brown*, 4 Paige, 360, reaches the same conclusion on this subject, and says: "In proceedings for contempts which are strictly criminal, all the proceedings after the granting of the attachment or order to show cause, and including the order, should be in the name of the people. As there has been no uniform practice in this court as to the entitling of orders and proceedings to enforce the rights or remedies of parties to the cause, as between themselves, it cannot be irregular to entitle them either way." In *Freeman v. City of Huron*, 8 S. D. 435 (66 N. W. 928), it is held that a contempt proceeding for violating an order in an action may properly be entitled as in that action. This conclusion is based upon the observation of Mr. Justice HANEY that "we have no statute regulating the matter." Such is not the case in this state, and in our opinion contempt proceedings should be instituted, if criminal, in the name of the state; if

civil, as in the case at bar, in the name of the state, upon the relation of a private party: *Haight v. Lucia*, 36 Wis. 355. But the defect in this respect we do not consider fatal, for the statute provides that the court may, at any time before trial, in furtherance of justice, and upon such terms as may be proper, allow any pleading or proceeding to be amended by adding the name of a party: Hill's Ann. Laws, § 101. Hammer was a proper party at the institution of the contempt proceedings, whereby jurisdiction of the subject-matter was secured; and under the liberal provision of the statute adverted to we think it apparent that the court had authority to permit, and was justified in allowing, the amendment.

9. It is maintained that, an appeal having been taken from the order of April 4, 1898, requiring Downing to satisfy the judgment, the proceedings supplemental to execution were stayed, and, this being so, the court had no jurisdiction of the contempt proceedings. The undertaking on the appeal from the final order requiring the judgment debtor to satisfy the judgment did not provide that, if the order appealed from were affirmed in whole or in part, Downing would satisfy the same; but it is argued by his counsel that a final order in proceedings supplemental to execution is not a judgment or decree for the recovery of money, or of personal property or the value thereof, within the meaning of the statute: Hill's Ann. Laws, § 538, subd. 1. Proceedings supplemental to execution are ancillary, and, as they cannot be instituted except in cases of a judgment against property, we think they are so closely connected with such judgment as to make the final order a part thereof, and render it necessary for the judgment debtor, in appealing therefrom, if he desire to stay the proceedings, to give an undertaking conditioned that he would satisfy the said order so far as affirmed, or to secure the court's order staying the proceedings. The court, in *People v. Bergen*, 53 N. Y. 404, speaking upon this subject, say: "Neither is it a defense in proceedings to punish for a contempt that an appeal has been taken from the order. If the proceedings have not been stayed, the party has a right to take every step for the enforce-

ment of his civil remedy that he might if no appeal was taken. In this case the proceedings are not stayed, but the relator has, by express permission of the court, the privilege of making such application under the order as his counsel may advise."

10. It is insisted that the affidavit upon which the proceedings are based does not state facts sufficient to give the court jurisdiction of the subject-matter, and hence its order punishing the defendant for a contempt is void. The rule is well settled that, before a party can be brought into contempt for not complying with an order of court, such order must be served upon him and demand made by a party authorized to require him to comply therewith, or that he has personal knowledge or notice of such order: *Johnson v. San Francisco Superior Court*, 63 Cal. 578; *Hennessy v. Nicol*, 105 Cal. 138 (38 Pac. 649); *Bonner v. People*, 40 Ill. App. 628; *Lorton v. Seaman*, 9 Paige, 609; *Tebo v. Baker*, 77 N. Y. 33. The facts constituting contempt, when not committed in the presence of the court, must be shown by affidavit [Hill's Ann. Laws, § 653; *State v. Kaiser*, 20 Or. 50 (23 Pac. 964, 8 L. R. A. 584); *State ex rel. v. Conn*, 37 Or. 596 (62 Pac. 289)], and such affidavit must aver service of the order [*State v. Gilpin*, 1 Del. Ch. 25] and demand for the payment of the sum awarded by a person qualified to make the same [*Gray v. Cook*, 24 How. Prac. 432; *McComb v. Weaver*, 11 Hun, 271; *Edison v. Edison*, 56 Mich. 185 (22 N. W. 264)]. An examination of the affidavit will disclose that it is defective in these particulars. The answer, however, admits the issuance of the order of April 4, 1898, and thereby cures the defect in the affidavit: *Papke v. Papke*, 30 Minn. 260 (15 N. W. 117); *People ex rel. v. Court of Sessions of Albany County*, 147 N. Y. 290 (41 N. E. 700).

11. It is maintained that the evidence demonstrates that it was impossible for Downing to comply with the order of April 4, 1898, and, this being so, he could not be guilty of contempt. At the time he was cited to appear to show why he should not be fined for a contempt, he testified as follows: "I have not had in my possession or under my control \$10,000 lawful money of the United States since the fourth day of April,

1898. I have not in my possession nor under my control at this time \$10,000 lawful money of the United States." It will be remembered that the judgment rendered against him and his partner was for the sum of \$7,817.50, and interest and costs, and, while he may not have had in his possession or under his control the sum of \$10,000, he may have had a sufficient sum to satisfy the judgment; for his testimony is a negative pregnant, admitting the possession of a sum of money less than \$10,000.

It is maintained that the judgment was erroneous, because based upon answers to questions propounded to Downing upon his cross-examination, tending to discover property other than the \$10,000 specified in the finding. His answers to the questions propounded on cross-examination were probably brought out to show his ability to comply with the order, and as a basis for determining the fine that should be imposed for disobedience thereof if he was able to comply therewith.

12. Other errors are assigned, but we do not think they are of sufficient importance to require consideration. The judgment in the case of *Hammer v. Downing*, upon which these proceedings were based, has been reversed [*Hammer v. Downing*, 39 Or. 504 (64 Pac. 651)], so that the defendant cannot be incarcerated thereunder until he pays the sum required, thus leaving the fine only to be enforced. It follows that the order is affirmed.

AFFIRMED.

Argued 9 December, 1901: decided 6 January, 1902.

ELLIOTT v. BLOYD.

[67 Pac. 202.]

EQUITABLE JURISDICTION TO RESTRAIN WASTE.

1. Where there is a privity of estate between the parties the owner of real property may sue to restrain threatened or partly accomplished waste thereon: *Sheridan v. McMullen*, 12 Or. 150, and *Bishop v. Baisley*, 28 Or. 119, applied.

JOINDER OF PARTIES—MULTIFARIOUSNESS.

2. Where the owners of different parcels of land contract jointly with another concerning their combined property, such owners may join in a suit to restrain waste on the leased ground.

CONSTRUCTION OF TIMBER CONTRACT.

3. An agreement between the owners of land and another recited that the owners sold the other all the saw timber on the land at a certain price per thousand feet, board measure, all scaling to be done at a mill which the other covenanted to erect on the land. The owners covenanted that they would permit the other to enter on the premises for the purpose of erecting a mill and doing anything necessary during the time allowed to cut and saw the timber. It was provided that no less than a certain amount of lumber should be cut each year, and that it should all be removed within ten years, but that the time might be extended for an additional five years. *Held*, that the contract was not a sale of the saw timber, but a license to erect a mill and manufacture lumber from the saw timber; and hence it was a violation of the agreement for the licensee to remove timber for telegraph poles, though they were scaled at the mill.

From Multnomah: JOHN B. CLELAND, Judge.

Suit by Mary Elliott and others against Clarence R. Bloyd and another. From a decree in favor of plaintiffs, defendants appeal.

AFFIRMED.

For appellants there was an oral argument by *Mr. Geo. C. Stout*, with a brief over the name of *Stott & Stout*, to this effect:

The defendants being separate owners of the land where the timber was being cut, cannot join as plaintiffs in a suit to restrain defendants from cutting timber on their lands: *City of Portland v. Paulsen*, 16 Or. 450 (1 L. R. A. 673, 19 Pac. 450); *Woolstein v. Welch*, 42 Fed. 566; *Fogg v. Nevada Ry. Co.* 20 Nev. 429 (23 Pac. 840); *Hinchman v. Railroad Co.* 17 N. J. Eq. 75 (86 Am. Dec. 252); *Yate v. Railroad Co.* 10 Ind. 174; *Railroad v. Prudden*, 20 N. J. Eq. 539; *Demanst v. Hardham*, 34 N. J. Eq. 472.

Where it appears from the evidence at the trial that plaintiffs have been improperly joined a court of equity will not grant an injunction: High, Inj. (3 ed.), §§ 1563 and 1613; *Moore v. Hill*, 59 Ga. 760; 10 Am. & Eng. Ency. Law, 796.

The court has no jurisdiction of this cause because there is no allegation in the complaint that the defendants are insolvent, and it appears both from the complaint and the proof that the value of the timber being cut can be ascertained: *Heaney v. Butte & Mont. Com. Co.* 10 Mont. 590 (27 Pac.

379); *Ewing v. O'Rourke*, 14 Or. 514 (13 Pac. 483); *Parsons v. Hartman*, 25 Or. 547 (30 L. R. A. 98, 42 Am. St. Rep. 803, 37 Pac. 61); *California Nav. & Imp. Co. v. Union Transp. Co.* 122 Cal. 641 (55 Pac. 591).

For respondents there was an oral argument by *Mr. Austin F. Flegel*, with a brief over the names of *Thomas H. Ward*, and *Mr. Flegel*, to this effect:

First. The court has jurisdiction to hear and determine this suit: *Sheridan v. McMullen*, 12 Or. 150 (6 Pac. 497); *Ewing v. O'Rourke*, 14 Or. 514 (13 Pac. 483); *Mendenhall v. Water Co.* 27 Or. 38 (39 Pac. 399); *Norton v. Elwert*, 29 Or. 583 (41 Pac. 926); *Bishop v. Baisley*, 28 Or. 119 (41 Pac. 937); *Natoma W. & M. Co. v. Clarken*, 14 Cal. 544; *Hecks v. Michael*, 15 Cal. 115; *Spear v. Cutter*, 5 Barb. 486; *Hawley v. Clawes*, 2 John. Ch. 121; *Kane v. Vanderburgh*, 1 John. Ch. 20; *Watson v. Hunter & McClay*, 5 John. Ch. 168 (9 Am. Dec. 295); *Peak v. Hayden*, 3 Bush, 125; *Markham v. Howell*, 33 Ga. 508; *Duncombe v. Felt*, 81 Mich. 332; *Pomeroy*, Eq. Jur. (2 ed.), vol. III, § 1348.

Second. The cutting of timber is waste: 28 Am. & Eng. Ency. of Law, 870; *Natoma W. & M. Co. v. Clarken*, 14 Cal. 544; *Hecks v. Michael*, 15 Cal. 115; *Spear v. Cutter*, 5 Barb. 486; *Peak v. Hayden*, 3 Bush, 125; *Sheridan v. McMullen*, 12 Or. 150 (6 Pac. 497).

MR. JUSTICE WOLVERTON delivered the opinion.

On October 20, 1896, Mary Elliott and Samuel Elliott, her husband, and W. C. Elliott, as parties of the first part, entered into an agreement with the defendant Clarence R. Bloyd, as party of the second part, of tenor following: "That the said parties of the first part, for and in consideration of the agreements herein promised to be done and performed by the party of the second part, hereby bargain, sell, and convey to said party of the second part all the saw timber on the following described premises, * * * for the agreed price of twenty-five cents per thousand, board measure, for any and all kinds of

timber except maple, for which the price shall be fifty cents per thousand. The logs to be scaled at the mill, and accounts of said scaling to be delivered by party of the second part to the parties of the first part, on demand, as often and at the end of each year from and after starting the mill hereinafter mentioned. Party of the second part to erect and put in operation a good and sufficient sawmill, with the necessary fixtures, and running by steam power of thirty horse power at least; parties of the first part also agreeing and binding themselves, their heirs and assigns, to allow said party of the second part free and absolute use, without charge, of ten acres, described as follows: * * * for a mill site on which to place sawmill, yards, and such buildings and improvements as party of the second part may wish. Parties of the first part also covenant and agree with party of the second part that they have a good right to sell and convey all of such timber as aforesaid, and that upon the execution of this agreement they will permit said party of the second part, or any one acting under his direction, to enter upon said premises for the purpose of erecting said mill and putting the same in running order, and to supply the same with logs cut on said premises, and to do any other acts necessary and proper with a sawmill and lumber business, during the full time in which the party of the second part is allowed to cut and saw said timber and dispose of the lumber cut at said sawmill; provided, that party of the second part shall cut and manufacture said timber within ten years; provided, that if party of the second part so desires, time may be extended for a period of five years longer from the termination of said ten years; and provided further, that the party of the second part shall not be required to use or pay for timber that is not merchantable. And party of the second part agrees and binds himself to erect, within twelve months from this date, and operate, a steam sawmill upon said premises, of a capacity of thirty horse power at least, and to render an account of the logs scaled at the end of each and every year after said sawmill shall have been put in operation, if demanded by parties of the first part, or their assigns, and will pay, within

one month after said account shall have been rendered, as aforesaid, for all of such scale, at the rate of twenty-five cents per thousand for yellow and red fir and cedar, and fifty cents per thousand for maple lumber. * * * Party of the second part agrees to cut at least one hundred thousand feet for each and every year, and pay therefor in United States gold coin, or its equivalent; also to leave all the buildings, except the sawmill, on the premises, after the expiration of this agreement." At the time of its execution Mary Elliott was the owner of one hundred and sixty acres and W. C. Elliott eighty acres of the land described therein. Some time in August, and at the time of the filing of the complaint herein, Bloyd and defendant Reed were engaged in cutting timber on said land for telegraph poles and shipping them away. This suit was instituted to restrain the further disposition of the timber in that manner, and for damages for waste suffered. The plaintiffs prevailed in the trial court, and the defendants appeal.

1. Preliminarily, it is urged that a suit will not lie to restrain the defendants from committing waste, and that plaintiffs, not being joint owners of the land involved by the agreement, could not join in the complaint, and for either cause the suit should be dismissed. There being a privity of estate between the plaintiffs and defendant Bloyd and Reed, acting at the latter's instance, a suit will lie, under the settled rules of equitable jurisdiction, to restrain the threatened waste: *Bishop v. Baisley*, 28 Or. 119 (41 Pac. 936); *Sheridan v. McMullen*, 12 Or. 150 (6 Pac. 497).

2. As to the other proposition, the contract or agreement upon which the suit is based is with the owners of the land jointly, and, having treated with the plaintiffs as jointly concerned in the timber, the defendants are not in a position to insist that the complaint is multifarious, and thereby require the plaintiffs to prosecute separate suits.

3. The cardinal question in the case is a matter of construction of the contract. By the first clause it would seem to evidence a bargain and sale of all the saw timber upon the premises at the price of twenty-five cents per one thousand feet,

board measure, for all timber except maple, and for that fifty cents per one thousand. By another clause plaintiffs covenant that they have good right to sell and convey all such timber, which is in accord with the idea of a sale. But when we come to the other features of the agreement we are led to conclude that an absolute sale of the timber was not intended. Bloyd agrees and binds himself to erect a thirty horse power steam sawmill upon the premises within twelve months; to operate the same, and cut at least one hundred thousand feet of lumber every year; and pay therefor in United States gold coin, or its equivalent. This gives proper connection to another covenant of plaintiffs with three conditions subjoined, denominated "provisos." These are, in effect, that they will permit Bloyd, or any one acting under his direction, to enter upon the premises for the purpose of erecting the mill and putting the same into operation, "and to supply the same with logs cut on said premises, and to do any acts necessary and proper with a sawmill and lumber business during the full time" he "is allowed to cut and saw said timber and dispose of the lumber cut at said sawmill;" provided, he shall cut and manufacture said timber within ten years, or, if he so desire, the time may be extended for an additional period of five years, he not being required to use or pay for timber not merchantable. Now, when construed by its four corners, looking through the whole instrument, as we are bound to do under well-established rules of construction, it is manifest that this is not a stumpage contract, or bargain and sale of the timber mentioned upon these premises, but a permit or license, simply, for the defendant Bloyd to erect a mill thereon, and manufacture lumber from the saw timber in amount not less than one hundred thousand feet per annum, and dispose of such lumber. The latter covenant of the plaintiffs shows the permit, which, along with the conditions imposed for cutting and manufacturing the timber within ten or fifteen years, and the other terms and conditions of the agreement relating to the mill, and the amount of lumber required to be manufactured annually, control and characterize the real nature of the agreement.

They are so repugnant to the idea of a bargain and sale of the saw timber to be cut within the time designated as to dispel it. While some of the language used is apt for a bargain and sale, yet, when construed in connection with the various covenants and agreements of the parties, the real purpose is apparent to grant a permit or license only, and that purpose must prevail. In this view it was a violation of the agreement for Bloyd to attempt to cut and remove timber from the premises for telegraph poles, and it made no difference that they were scaled at the mill. They were not manufactured into lumber, and disposed of as such, but by the lineal foot, as timber of the kind is bought and sold in the market. Other than this, the meaning of the term "saw timber," as used by the parties in formulating the agreement, is not a matter of controversy.

The decree of the trial court will therefore be affirmed.

AFFIRMED.

Argued 11 December, 1901; decided 6 January, 1902.

WETMORE v. WETMORE.

[67 Pac. 98.]

DIVORCE—TITLE TO REALTY.

The title to realty cannot be determined in a divorce suit except as it may be incidentally involved—so that, where the case has been dismissed as to the divorce, it cannot be continued as one to obtain a reconveyance of land.

From Multnomah: JOHN B. CLELAND, Judge.

Suit by Dorothea Wetmore against Ward C. Wetmore, which was dismissed, and the plaintiff appealed. AFFIRMED.

For appellant there was a brief and an oral argument by *Mr. William M. La Force*.

For respondent there was a brief over the name of *Edw. W. Bingham*, with an oral argument by *Mr. Thos. G. Greene*.

PER CURIAM. This is a suit for divorce and to compel a conveyance from the defendant to the plaintiff of certain real estate, which it is alleged was purchased with her money. The complaint was dismissed by the court below, and the plaintiff appeals. An examination of the record satisfies us that the testimony is not sufficient to justify a decree of divorce, and, as the title to real estate cannot be litigated in a proceeding of this kind except as incident thereto [*Houston v. Timmerman*, 17 Or. 499 (21 Pac. 1037, 4 L. R. A. 716, 11 Am. St. Rep. 848); *Uhl v. Uhl*, 52 Cal. 250; *Peck v. Peck*, 66 Mich. 586 (33 N. W. 893)], the decree is affirmed. AFFIRMED.

Argued 5 December, 1901; decided 6 January, 1902.

SINGER MANUFACTURING CO. v. DRIVER.

[67 Pac. 111.]

PRESUMPTION.

1. Where one claimed goods taken under an attachment by an officer, but withdrew his claim before the retiring of the sheriff's jury, and sued the officer for conversion, and it appeared there had been a sale under the attachment, but not whether the action was commenced before the sale, it will be presumed, on a motion by defendant for judgment on the pleadings, that the action of conversion was commenced before the sale.

EFFECT OF WITHDRAWING CLAIM TO ATTACHED PROPERTY.

2. Where property in the hands of an officer is claimed in writing by a stranger to the writ under which it is held, the withdrawal of the claim before the retiring of the sheriff's jury called to try the question of title ends the trial (Hill's Ann. Laws, §§ 286, 288), and proceedings thereafter by such jury are entirely ineffective to constitute an estoppel on the claimant: *Vulcan Iron Works v. Edwards*, 27 Or. 563, applied.

From Multnomah: ALFRED F. SEARS, JR., Judge.

Action by the Singer Manufacturing Company against T. J. Driver, the Sheriff of Wasco County. Judgment for defendant, and plaintiff appealed. REVERSED.

For appellant there was a brief over the name of *Woodward & Palmer*, with an oral argument by *Mr. John H. Woodward*.

No brief nor argument for respondent.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is an action of trover. The complaint alleges, in substance, that on the eighteenth day of March, 1897, the plaintiff was the owner and in the lawful possession of two Singer sewing machines, of the value of \$70 each, which the defendant, as sheriff, wrongfully, unlawfully, and forcibly took possession of and converted to his own use, to plaintiff's damage in the sum of \$140. The answer denies all the material allegations of the complaint, and for an affirmative defense avers that one J. A. Simms was the owner and in possession of the machines mentioned in the complaint, and that, on the seventeenth day of March, 1897, Jones & Kribs, as partners, commenced an action in the circuit court for Wasco County against Simms to recover money, and caused a writ of attachment to be issued and placed in the hands of defendant, who, by virtue thereof, attached the property referred to; that thereafter, on March 29, Jones & Kribs recovered judgment against Simms, and an order for the sale of the attached property, and, in pursuance of an execution regularly issued on the judgment, the machines were advertised and sold at public auction in the manner provided by law to one W. C. Barrell for the sum of \$25 each; that, after the attachment, and on the nineteenth of March, the plaintiff notified the defendant in writing that it was the owner and entitled to the possession of the machines; that thereafter, on the eighth day of April, 1897, the defendant, after notice to the plaintiff and to Jones & Kribs, summoned a jury to try the validity of such claim, which, after hearing the evidence, found that the property belonged to Simms; that by reason of such proceedings and verdict the plaintiff is estopped from bringing or maintaining the present action. A reply put in issue the new matter set up in the answer, and, as a further and separate reply, alleged, in substance, that, before the alleged trial before the sheriff's jury was had, the plaintiff withdrew the claim to the property it had theretofore made to the sheriff. A motion for judgment on the pleadings was sustained in the court below, and a judgment rendered against the plaintiff, from which it appeals.

1. There is no appearance or brief for the defendant, but we are advised that in the opinion of the court below the plaintiff could not maintain this action because it withdrew its claim to the property before the trial by the sheriff's jury. Such withdrawal is not pleaded as a defense, nor are any facts alleged that would constitute an estoppel, except the verdict, which, under the allegations of the reply, is of no validity, because the claim was withdrawn before the jury retired: Hill's Ann. Laws, § 288. There is no allegation in the pleadings as to the time of sale of the property by the sheriff, and for the purpose of the motion for judgment on the pleadings it must be assumed that this action was commenced before such sale.

2. The single question, therefore, is whether the mere withdrawal of a claim made by a third person to property seized by a sheriff under a writ of attachment or execution operates as a bar to an action brought by the claimant prior to the sale against the sheriff to recover possession of the attached property or its value. This question was considered by the court in *Vulcan Iron Works v. Edwards*, 27 Or. 563 (36 Pac. 22, 39 Pac. 403), and it was there said: "We see no reason why such withdrawal should work an estoppel as against the claimant in favor of the sheriff, or any other party, if action should be instituted at once, or before sale of the property." By the notice in writing the claimant becomes an actor, and thereby vests the sheriff with the right to protect himself by the verdict of the sheriff's jury against an action by the plaintiff in the writ, if it is in favor of the claimant, as well as one brought by the claimant if against him, and he can only be denied this right by the withdrawal of the claim. But when the claim is withdrawn the statute declares that "the trial shall proceed no further" (Hill's Ann. Laws, § 288), and thereafter the matter stands as if no claim had been made, unless some subsequent act of the sheriff, relying on the faith of such withdrawal, when properly pleaded, constitutes estoppel. As no estoppel is pleaded in this case, we are of the opinion that the judgment must be reversed, and it is so ordered. REVERSED.

Argued 17 December, 1901; decided 6 January, 1902.

DAVENPORT v. DOSE.

[67 Pac. 112.]

EFFECT ON COUNTERCLAIM OF MOTION FOR NONSUIT.

1. A motion to nonsuit for insufficiency of evidence does not amount to an admission by defendant that a counterclaim set up by him is without merit.

PLEADING—EFFECT OF ADMISSION.

2. Hill's Ann. Laws, § 94, provides that every material allegation of the complaint not denied by the answer shall be taken as true. Plaintiff alleged that he was employed to ship grain for defendant, and sued for commissions. The answer denied the allegations of the complaint, "except as hereinafter stated;" alleged that plaintiff was employed to ship grain; conceded that a certain sum was due him as commission; and set up a counterclaim. It further averred that "the agreement mentioned * * * is the same pretended agreement mentioned in plaintiff's complaint, and the oats * * * are the same identical oats referred to in plaintiff's complaint." *Held*, error to grant a nonsuit, plaintiff's claim being admitted by the answer, and evidence in its support being unnecessary.

From Marion: GEO. H. BURNETT, Judge.

Action by J. L. Davenport against Fred Dose, commenced in a justice's court. On appeal to the circuit court judgment of nonsuit was entered on defendant's motion, from which plaintiff appealed. **REVERSED.**

For appellant there was a brief and an oral argument by *Messrs. B. F. Bonham, and Carey F. Martin.*

For respondent there was a brief and an oral argument by *Messrs. John A. Carson, and Loring K. Adams.*

MR. JUSTICE MOORE delivered the opinion.

This action was commenced in the justice's court of Salem District, Marion County, to recover a balance due for the alleged handling and shipping ten thousand nine hundred and fifty bushels of oats for the defendant, for which he promised to pay plaintiff a commission of one half cent per bushel, or the sum of \$54.75, upon account of which he paid \$15, leaving due and unpaid the sum of \$39.75, for which judgment is de-

manded. The answer, having denied the material allegations of the complaint, "except as hereinafter stated," averred, as a separate defense and counterclaim, that defendant employed plaintiff, agreeing to pay him said commission for all the oats that he might purchase, weigh, and ship for him; that, in pursuance of such agreement, plaintiff purchased, weighed, and shipped ten thousand four hundred and thirteen bushels, and no more; that plaintiff wrongfully represented to defendant that he had purchased ten thousand six hundred and fifty-one bushels and eighteen pounds of oats, and the defendant, believing such representations to be true, and relying thereon, paid to persons from whom he represented that he had made such purchases the full price for the quantity so represented, thereby paying \$71.40 for oats which he never received; that he paid plaintiff said sum of \$15 before he discovered that he had not purchased, weighed, or shipped the quantity so represented; that the agreement and the oats mentioned in the separate answer and counterclaim are the same pretended contract and the identical grain referred to in the complaint as the foundation of the pretended cause of action. The answer demands judgment in the sum of \$34.33. The reply having put in issue the allegations of new matter in the answer, a trial was had, resulting in a judgment for plaintiff in the sum demanded, from which the defendant appealed to the circuit court for said county, and at the trial therein the defendant moved for a judgment of nonsuit, whereupon the plaintiff moved for a judgment on the pleadings, but the former motion having been granted, and the latter denied, the action was dismissed, and the plaintiff appeals to this court.

1. It is contended by plaintiff's counsel that the defendant, having moved for a judgment of nonsuit, thereby waived his alleged counterclaim, and entitled plaintiff to a judgment on the pleadings for the sum of \$37.07, admitted by the answer to be due him. It would appear from the abstract upon which this cause was tried that the plaintiff, in the court below, offered no evidence in support of his cause of action. This inference is deduced from the following motion, interposed in

the trial court, viz.: "Now comes the defendant, and moves the court for a judgment of nonsuit, upon the ground that the plaintiff has failed to prove a cause sufficient to be submitted to the jury, and upon the further ground that plaintiff has entirely failed to produce any evidence whatever." At the same time the following motion was filed: "This thirteenth day of February, 1900, comes plaintiff, above-named, by his attorneys, Bonham, Jeffrey & Martin, and moves the court for judgment upon the pleadings herein for the sum of \$37.07, and for costs and disbursements." In *Wood v. Ramond*, 42 Cal. 643, it was held that a nonsuit granted on motion of the defendant is equivalent in its operation to a dismissal of the action with the consent of the defendant, even though he set up new matter and asked for affirmative relief in his answer. Plaintiff's counsel rely upon the case adverted to in support of their motion for a judgment on the pleadings. But, whatever the rule may be, we do not think defendant, by moving for a judgment of nonsuit, thereby admitted that his counterclaim was without merit.

2. In our opinion, the motion for the judgment of nonsuit, in effect, presented the question upon whom the burden of proof was imposed. The complaint alleges that the plaintiff was employed to handle and ship grain. The answer denies this averment, "except as hereinafter stated," and affirmatively alleges that he was employed to "buy, weigh, and ship oats," and this averment is not denied in the reply. The answer also contains the following averment: "That the agreement mentioned in this further and separate answer and counterclaim is the same pretended agreement mentioned in plaintiff's complaint, and the oats mentioned and described in this further and separate answer and counterclaim are the same identical oats referred to in plaintiff's complaint, and this counterclaim is based upon and arises out of the same matters set forth in the plaintiff's complaint as the foundation of his pretended cause of action against this defendant." We think there can be no controversy about the identity of the contract set out in the answer and admitted by the reply. The answer

concedes that there was due the plaintiff the sum of \$37.07, but seeks to prevent the recovery of any sum by the counterclaim of \$71.40 for damages resulting from alleged underweight of grain. The plaintiff, by neglecting to offer any evidence, accepted the averments of the answer, whereby the burden of proof shifted to the defendant to establish his counterclaim as an offset thereto. In our opinion, the court erred in granting the nonsuit, for, there being no issue in respect to the sum admitted to be due by the answer, there was no necessity of introducing any evidence in support thereof: *Hill's Ann. Laws*, § 94; *Landers v. Bolton*, 26 Cal. 393; *Lilienthal v. Anderson*, 1 Idaho, 673. But we do not think the plaintiff was entitled to a judgment upon the pleadings, nor believe that the defendant conceded the invalidity of his counterclaim. For these reasons the judgment is reversed and a new trial ordered.

REVERSED.

Argued 12 December, 1901; decided 13 January, 1902.

SALEM v. ANSON.

[56 L. R. A. 169, 67 Pac. 190.]

MUNICIPALITIES—FRANCHISE—VALIDITY OF BOND.

1. Under a city charter conferring on the municipality power to "contract for water and lights for city purposes, * * * and grant and allow the use of streets and alleys of the city to any person, company or corporation who may desire to establish works for supplying the city and its inhabitants with water or light, upon such terms as the council may prescribe," the council may require the grantee of such a franchise to give a bond conditioned that the terms of the franchise will be complied with. Such bond is not beyond the power of the city to require and accept.

BOND TO COMPLY WITH FRANCHISE—LIQUIDATED DAMAGES.*

2. Where a city has required from the grantee of a public franchise a bond conditioned that the terms of the grant shall be complied with, and the bond has been tendered and accepted, the sum specified in such bond is substantially a statutory penalty, and, upon a breach of the bond, the entire sum may be recovered, without proof of special injury.

From Marion: GEO. H. BURNETT, Judge.

*NOTE.—For collections of authorities on whether the sum named in a bond is a penalty or a liquidated sum, see 85 Am. St. Rep. p. 479, and 56 L. R. A. 169.—REPORTER.

This is an action on a bond executed by F.R. Anson, as principal, and the Fidelity & Deposit Company of Maryland, as surety. On May 17, 1900, upon the application of Anson, the Common Council of the City of Salem passed an ordinance, granting to him, his successors and assigns, the right to establish and maintain an electric light plant within the city, and to use its streets, alleys, and highways therefor. Anson, under the terms of the ordinance, was to have the plant so far completed by the first day of April, 1901, as to be ready to serve private consumers, and, in default thereof, was to forfeit the rights and privileges so granted. After the plant should be installed and in operation, he was to pay to the city monthly two per cent. of the gross income therefrom. The city reserved the right of purchasing and acquiring the entire plant at any time, at the actual cost thereof. By section 8 of the ordinance, Anson was required to file with the recorder of the city, within thirty days from its approval, "a bond in the sum of five thousand (5,000) dollars, lawful money of the United States, with two or more sureties, or a surety or guaranty company, to be approved by the mayor, conditioned that he or they will install the electric plant authorized by this ordinance on or before the first day of April, A. D. 1901, which said plant shall have a maximum capacity of at least one hundred horse power, and that such plant shall be in actual operation on such date." Anson filed a written acceptance of the provisions of the ordinance within the time specified, and, in compliance with section 8 thereof, made, executed and delivered to the city the following bond, with the defendant corporation as surety:

"Know all men by these presents, that we, Franklin R. Anson of Salem, Oregon, as principal, and Fidelity and Deposit Company of Maryland, a corporation organized and existing under and by virtue of the laws of the State of Maryland, United States of America, as surety, are held and firmly bound unto the City of Salem, in the County of Marion, State of Oregon, in the sum of five thousand dollars (5,000) lawful money of the United States, for the payment of which sum

well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this May 19, 1900.

The condition of the above obligation is such that, WHEREAS the above bounden Franklin R. Anson has entered into a certain contract or agreement with the said City of Salem, through and by means of a passage by the common council and approval by the mayor of the said City of Salem, of a certain ordinance, known as 'Ordinance No. 387,' of said City of Salem; and the acceptance of the provisions of the said ordinance on his part, whereby the said Franklin R. Anson undertakes and agrees to install within the said City of Salem, Oregon, an electric light plant having a maximum capacity of at least one hundred horse power, on or before the 1st day of April, A. D. 1901, and that the said plant shall be in actual operation on said date: now, therefore, if the said Franklin R. Anson, or his successors and assigns, shall well and faithfully, duly, and fully perform, complete, and discharge said contract, upon his or their part, to the extent of installing within the said City of Salem an electric plant having a maximum capacity of at least one hundred horse power, and shall have the same in actual operation and in condition to furnish electric lights or currents to customers along the route of its lines upon the 1st day of April, A. D. 1901, then (this) obligation shall be null and void and of no effect; otherwise to remain in full force and virtue."

Anson failed to construct the plant, or any part thereof, as required by the ordinance, and, in May, 1901, the city began this action against him and his surety to recover the sum of \$5,000, the amount specified in the bond. The complaint sets out the ordinance and bond in full, but does not allege that the city was damaged in any way by reason of Anson's default. The court below sustained a demurrer to the complaint, and, the plaintiff not pleading further, entered judgment against it, from which it appeals.

REVERSED.

For the City of Salem there was a brief over the names of *W. H. and Webster Holmes*, with an oral argument by *Mr. William H. Holmes*.

For the Fidelity & Deposit Company, there was a brief over the name of *Ramsey & Bingham*, with an oral argument by *Mr. Geo. G. Bingham*.

MR. CHIEF JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

1. The first question is as to the right of the city to take and receive the bond upon which this action was brought. The charter of Salem declares that the common council shall have exclusive power to "contract for water and lights for city purposes, or to lease, purchase, or construct a plant or plants for water or lights, or both, for city purposes, in or outside the city limits; provided, that the council, upon making a careful and accurate estimate of building or purchasing and running such plant or plants, finds that the same may be constructed or purchased and run at a much less expense to the city than can be contracted for with private parties. The expense for building or purchasing such plant or plants cannot be entered into except by two-thirds vote of all the legal voters voting at any general election, or at a special election called by the council for such purpose, by a two-thirds vote to incur such expense, the council may enter into a contract; provided, that the council may grant and allow the use of streets and alleys of the city to any person, company or corporation who may desire to establish works for supplying the city and inhabitants thereof with such water or light upon such terms and conditions as the council may prescribe" (Laws, 1899, p. 924, § 6, subd. 6); and "to allow and regulate the erection and maintenance of poles or poles and wires for telegraph, * * * electric light or other purposes, * * * upon or over the streets, alleys or public grounds of the city; to permit and regulate the use of the streets, alleys and public grounds of the city for laying down and repairing gas and water mains,

for building and repairing sewers, and the erection of gas or other lights; to preserve the streets, alleys, side and cross walks, bridges, and public grounds from injury, and prevent the unlawful use of the same, and to regulate their use'' (Laws, 1899, p. 927, § 6, subd. 26). The legislature has thus delegated to the city the power of regulating and controlling the use of the streets by light and water companies, and vested it with exclusive authority to grant to such companies the privilege of so using them, upon such terms and conditions as the council may prescribe. The paramount authority over streets and highways is vested in the legislature as the representative of the entire people. It may, however, delegate to municipal corporations such a measure of its power as it may deem expedient, and the local authorities, by virtue of such delegation, can enact ordinances and local laws, which have, within their jurisdiction, the force of the general statutes of the state: Tiedeman, Mun. Corp. § 289.

The granting of authority to public service companies to use the streets and highways is a legislative act, entirely beyond the control of the judicial power, so long as it is within proper constitutional limitations. It may be exercised directly by the legislature, or be delegated by that body to a municipal corporation; and, when so delegated, the municipality has, within the authority granted, the same rights and powers that the legislature itself possesses. To that extent it is endowed with legislative sovereignty, the exercise of which has no limit, so long as it is within the objects and trusts for which the power was conferred. It is admitted that the legislature may, by virtue of its paramount authority, require bonds or undertakings of the grantees of such privileges, conditioned that they will construct their works within a specified time, or that they will otherwise comply with the terms of their grant, and a municipal corporation to which the exclusive power over the subject has been delegated may exercise the same right. There is no express provision in the charter of Salem authorizing the council, upon granting the privileges to use the streets, to require that the work shall be done within a specified time;

nor is it necessary. It is given the exclusive power to make the grant "upon such terms and conditions" as it may prescribe, which necessarily authorizes it to impose such reasonable conditions precedent or subsequent to the granting or exercise of the franchise as may be deemed necessary or proper, including a requirement that the grantee shall give a bond, conditioned as the one in suit: *City of Indianola v. Gulf, W. T. & P. Ry.* 56 Tex. 594. In *City of Aberdeen v. Honey*, 8 Wash. 251 (35 Pac. 1097), the power of the municipality was limited by the terms of its charter, and the court held that, by reason of such limitation, it did not have the authority to exact a bond from the grantee of a franchise for a street railway. Hence that case is not authority here. We are of the opinion, therefore, that the bond in suit was valid, and within the power of the city to require and accept.

2. The remaining question is as to whether the sum specified in the bond is to be regarded as a penalty, or as liquidated damages. It is often difficult to determine whether a sum stipulated in a contract to be paid on breach thereof shall be considered as liquidated damages or as a penalty, and there is a wide divergence of opinion in the adjudged cases on the subject. The object is, of course, to ascertain the intention of the parties, as nearly as possible, and to enforce the contract according to their agreement. In doing this, the courts are not governed altogether by the language of the contract or by the term employed to designate the sum to be paid. "If it is liquidated damages, they will enforce it, though erroneously called a 'penalty,' and, on the other hand, if it is in the nature of a penalty, they will not allow it to be enforced, although the parties have expressly stated that it is to be paid as 'liquidated damages,' and not as a 'penalty'": Clark, Contr. 599. See, also, 53 Cent. Law J. 183; 19 Am. & Eng. Ency. Law (2 ed.), 400; *Kemp v. Knickerbocker Ice Co.* 69 N. Y. 45; *Foley v. McKeegan*, 4 Iowa, 1 (66 Am. Dec. 107). For the construction of such contracts, as between private parties, certain arbitrary rules have been laid down, which, although not necessarily controlling in all cases, are regarded as affording a

general guide by which controversies relating thereto may be determined. Among these are: (1) Where the contract is conditioned for the performance of some collateral agreement, the sum mentioned therein will be presumed to be a penalty, and it is incumbent upon the party desiring to recover the sum named as liquidated damages to show that it was so intended by the contracting parties: *O'Keefe v. Dyer*, 20 Mont. 477 (52 Pac. 196); *Davis v. Gillet*, 52 N. H. 126; *Dill v. Lawrence*, 109 Ind. 564 (10 N. E. 573); and (2) when the actual damages in case of a breach of the contract must necessarily be speculative, uncertain, and incapable of definite ascertainment, the stipulated sum will be regarded as liquidated damages, and may be recovered as such without proof of actual damages, unless the language of the contract shows, or the circumstances under which it was made indicate, a contrary intention of the parties, or it so manifestly exceeds the actual injury suffered as to be unconscionable: 19 Am. & Eng. Ency. Law (2 ed.), 402; Clark, Contr. 600; 1 Sutherland, Dam. (2 ed.), § 283; *Commonwealth v. Ginn* (Ky.), 63 S. W. 467; *Malone v. City of Philadelphia*, 147 Pa. 416 (23 Atl. 628); *Emery v. Boyle*, 200 Pa. 249 (49 Atl. 779); *Taylor v. Times Newsp. Co.* 83 Minn. 523 (86 N. W. 760). Where the damages are uncertain and speculative, the presumption ordinarily is that the parties have taken that into consideration in making the contract, and have agreed upon a definite sum to be paid in case of a breach, in order to put the question beyond dispute and controversy and to avoid the difficulty of proving actual damages. It would seem, therefore, that, even if the present case is to be controlled entirely by the rules applicable to controversies between private parties, there is reason for holding that the amount stipulated in the bond should be regarded as liquidated damages, and not as a penalty. The damages, if any, to the city from Anson's failure to build his plant within the specified time, were necessarily speculative and uncertain, if not absolutely incapable of proof. Indeed, it is quite doubtful whether the city could have been damaged in any way by such failure. It could gain nothing in its political or sovereign

capacity by the construction of the plant, and could lose nothing by its nonconstruction. The damages resulting from the loss of the promised share of the gross income of the proposed plant and the right of purchase are not covered by the bond, and, moreover, are so speculative, uncertain, and dependent upon so many contingencies, that they can scarcely be regarded as a subject of judicial investigation.

But, whatever the rule might be as between private individuals, this action is not to be determined wholly by the principles applicable to contracts of that kind. The sum specified in the bond is somewhat in the nature of a statutory penalty for the nonperformance of a duty enjoined by law. The ordinance granting to Anson the right and privilege to use the streets and highways of the city in the construction and maintenance of his plant had the force and effect of a statute, and by his acceptance of its provisions he became bound to comply with its terms as a statutory duty. The bond in question was given as security for the performance of such duty, and the sum specified therein is in the nature of a penalty, to be imposed as a punishment for disobeying or disregarding the provisions of the ordinance: *Maryland, to use, v. Baltimore & O. R. Co.* 44 U. S. (3 How.) 534. The case of *Clark v. Barnard*, 108 U. S. 436 (2 Sup. Ct. 878), is very similar to the one in hand. The legislature of Rhode Island passed an act authorizing the Boston, Hartford & Erie Railroad Company to locate and construct a railroad through the state, but the act was not to go into effect unless the railroad company should, within ninety days from the adjournment of the legislature, deposit in the office of the treasurer its bond, with sureties satisfactory to the governor, in the sum of \$100,000, that it would complete the road before the first day of January, 1872. In compliance with this statute, the railroad company made, executed, and filed in the office of the treasurer an ordinary penal bond in the sum stated, conditioned as in the act required. It failed to build the road, and, in a suit to enjoin the treasurer from receiving or collecting the sum specified in the bond, it was contended, as here, that the obligation required by the statute

and given by the company was an ordinary penal bond, upon which no recovery could be had except for the damages the state actually sustained from the breach of its conditions, and, it being admitted that no damages had resulted, the money arising from the payment of a certificate of indebtedness pledged in lieu of sureties on the bond reverted to the plaintiff. This position was sustained by the trial court, but on appeal the decree was reversed, and it was held that the state was entitled to collect the full amount of the bond, notwithstanding it was admitted that it had not been damaged by the breach thereof. The judgment is based upon two principal considerations: (1) That it was not, and could not have been, intended by the parties that the bond was a mere indemnifying bond; and (2) that the sum mentioned therein was imposed by the state as a statutory penalty for the nonperformance of a statutory duty.

After pointing out that no damage could possibly have arisen to the state in its sovereign or political capacity by the failure of the railroad company to construct its road as provided in this statute, Mr. Justice MATTHEWS, speaking for the court, said: "The question of damages and compensation was not, because it could not have been, in contemplation of the parties. There was no room for supposing that there could be any. To assume that the statute required this bond and security in this sense, in full view of the legal conclusion which it is said necessarily flows from its form, and that in the event contemplated, of the failure to build the road, all that remained to be done was that the state should hand back canceled the obligation and security it had been at such pains to exact, is to put upon the transaction an interpretation altogether inadmissible. It would have been, upon such an assumption, a vain and senseless thing, and, however private persons may be sometimes supposed to act improvidently, we are not to put such constructions, when it is legally possible to avoid them, upon the deliberate and solemn acts and transactions of a sovereign power, acting through the forms of legislation. The conclusion, in our opinion, cannot be resisted that the in-

tention of the parties in the transaction in question was that, if the railroad should not be built within the time limited, the corporation should pay to the state, absolutely and for its own use, the sum named in the bond and secured by the deposited certificate of indebtedness. The supposition is not open that the penalty was prescribed merely *in terrorem*, to secure punctuality in performance, with the reserved intention of permitting subsequent performance to condone the default, for a distinct section of the statute * * * declares that, in cases of failure to complete the road within the time limited, the act itself should be void and of no effect." In *Nilson v. Town of Jonesboro*, 57 Ark. 168 (20 S. W. 1093), the city granted to Nilson the right to construct a street railway over and through the streets of the city, and took from him a bond, in the sum of \$500, conditioned for the faithful performance by him of the provisions of the ordinance. In an action to recover on the bond because of his failure to construct the railway within the time specified, the single question presented was whether the sum mentioned in the bond should be treated as a penalty or as liquidated damages, and, after a careful examination of the authorities, it was held that plaintiff was entitled to recover the amount specified, without proof of actual damages, and notwithstanding it appeared that the damages were in fact capable of assessment. In *City of Indianola v. Gulf, W. T. & P. Ry.* 56 Tex. 594, the City of Indianola granted a railway company the right to construct its road through one of the streets of the city, on the condition that it should extend it to a point sixty-five miles distant within a certain definite time, and exacted a bond in the sum of \$50,000, conditioned for the faithful performance of the grant on its part. The company failed to construct the road, and in a suit on the bond it was held that the sum stated therein was stipulated damages, and that the city could recover the full amount thereof without proof of actual damages. It is true that in that case, as also in *Nilson v. Town of Jonesboro*, 57 Ark. 168 (20 S. W. 1093), the term "liquidated damages" was used in the contract. But the decisions did not turn upon

that fact, but were principally controlled by the consideration that no accurate computation of the real damages could be made.

Within the doctrine of these cases, and they seem to be sound, the demurrer to the complaint should have been overruled. The judgment of the court below must therefore be reversed, and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion.

REVERSED.

Argued 3 March; decided 17 March, 1902.

SLATE'S ESTATE.

HENKLE *v.* SLATE.

[68 Pac. 899.]

PROBATE COURTS—JURISDICTION—COLLATERAL ATTACK.

1. County courts are courts of general jurisdiction when transacting probate business, and their decrees as such cannot be collaterally attacked, except for want of jurisdiction apparent on the face of the record.

40	349
45	434
40	349
47	619

POWER TO APPOINT ADMINISTRATOR—RESIDENCE OF DECEASED.

2. Under Sections 1083 and 1085 of Hill's Ann. Laws, administration on the estate of a deceased intestate inhabitant of Oregon can be granted only by the county court of the county of which such person was an inhabitant at the time of death.

From Linn: REUBEN P. BOISE, Judge.

This was a proceeding in the matter of the estate of Frances Slate, deceased, to remove the person who had been appointed administrator in Linn County. Further facts appear in the opinion. From a judgment in favor of the Linn County administrator the petitioner appeals.

REVERSED.

For appellant there was a brief over the names of *H. C. Watson* and *W. S. McFadden*, with an oral argument by *Mr. Watson*.

For respondent there was a brief over the names of *Weatherford & Wyatt*, and *J. J. Whitney*, with an oral argument by *Mr. Jas. K. Weatherford*, and *Mr. Whitney*.

MR. JUSTICE MOORE delivered the opinion.

This controversy involves the right of a county court to appoint an administrator of the estate of an intestate who at the time of her death was an inhabitant of another county. The transcript shows that the defendant applied to the county court of Linn County to be appointed administrator of the estate of Frances Slate, deceased; his petition therefor, so far as material herein, being as follows: "Your petitioner would most respectfully allege and show that Frances Slate died intestate in Benton County, Oregon, on the twenty-second of November, 1895, and at the time of her death she was a resident and an inhabitant of Benton County, Oregon, and at said time she left an estate in Linn County, Oregon, consisting of landed property of the probable value of \$4,000; that there has been no administration of said estate." This petition was granted, and the facts as stated therein are recited in the order appointing the defendant. Thereafter the plaintiff petitioned the county court of Linn County to revoke such appointment, alleging that he had been appointed administrator of said estate by the county court of Benton County, and that he had duly qualified and entered upon the discharge of his trust. The defendant, having been cited to appear, demurred to the petition for his removal on the ground, among others, that it did not state facts sufficient to entitle the plaintiff to the relief demanded. The court, however, overruled the demurrer, relieved the defendant of his trust, and revoked his letters of administration, whereupon he appealed to the circuit court for Linn County, which reversed the decree of the county court, sustained the demurrer interposed therein, and dismissed the plaintiff's petition; and from such decree the latter appeals to this court. The questions to be considered are (1) whether the county court of Linn County had jurisdiction of the decedent's estate; and (2) if it had no authority to appoint an administrator, could it in a proceeding of this character revoke such appointment?

1. Considering these inquiries in their inverse order, the rule is settled in this state that a county court, in the transac-

tion of probate business, is a court of general and superior jurisdiction: *Russell v. Lewis*, 3 Or. 380; *Tustin v. Gaunt*, 4 Or. 305; *Monastes v. Catlin*, 6 Or. 119; *Oh Chow v. Brockway*, 21 Or. 440 (28 Pac. 384). Its decrees pertaining to the administration of a decedent's estate import absolute verity, and, this being so, they cannot be overthrown by evidence *aliunde* the record; but when such a decree sets out what was done, and the facts so recited are insufficient to confer jurisdiction, a want thereof is apparent upon the face of the record, in which case it is void, and may be impeached upon a collateral attack: 1 Woerner, Adm'n (2 ed.), § 144; *Tustin v. Gaunt*, 4 Or. 305; *Murray v. Murray*, 6 Or. 17. Every court of superior jurisdiction possesses inherent power to vacate entries in its record of judgments, decrees, or orders made without jurisdiction, notwithstanding the term at which they were rendered may have expired: *Ladd v. Mason*, 10 Or. 308; *Ramp v. McDaniel*, 12 Or. 108 (6 Pac. 456); *Cochran v. Baker*, 34 Or. 555 (52 Pac. 520, 56 Pac. 641). "Where the record," say the editors of the *Encyclopædia of Pleading and Practice* (volume XVIV, p. 841), "affirmatively discloses a want of jurisdiction, the appointment of an administrator may always be collaterally attacked." While the petition to revoke the defendant's letters of administration may have been an indirect attack upon the order appointing him, if it should appear from an inspection of the record that such order was made without jurisdiction the county court possessed plenary power and was authorized to purge its record of such void order.

2. Considering the authority of the county court of Linn County to appoint an administrator of the estate of a person who at the time of her death was an inhabitant of Benton County, the statute prescribing jurisdiction of the subject-matter in such cases is (Hill's Ann. Laws, § 1083), as follows: "Proof of a will shall be taken by the county court as follows: (1) When the testator, at or immediately before his death, was an inhabitant of the county, in whatever place he may have died; (2) when the testator, not being an inhabitant of this state, shall have died in the county, leaving assets therein;

(3) when the testator, not being an inhabitant of this state, shall have died out of the state, leaving assets in the county; (4) when the testator, not being an inhabitant of this state, shall have died out of the state, not leaving assets therein, but where assets thereafter came into the county; (5) when real property, devised by the testator, is situated in the county, and no other county court has gained jurisdiction under either of the preceding subdivisions of this section.” Section 1085 reads, “Administration of the estate of an intestate shall be granted by the county court, authorized to take proof of a will as prescribed in section 1083, in case such intestate had made a will.” The county court, empowered to admit the will of a testator to probate, being authorized to grant administration of the estate of an intestate, the subdivisions of Section 1083, Hill’s Ann. Laws, prescribing the county in which the will must be probated, necessarily control in determining the particular county court possessing the requisite power to grant administration of the estate of an intestate. Frances Slate at the time of her death being an inhabitant of Benton County, Oregon, and dying seised or possessed of real or personal property in this state, the county court of that county was undoubtedly authorized to admit her will to probate, if she had made a testamentary disposition of her property, because such inhabitancy and the existence of the property within the state would give the county court of Benton County jurisdiction of the *res*; and, this being so, no doubt exists that such court was also empowered to grant administration of her estate. To authorize the county court of Linn County to grant such administration, the clause “devised by the testator” must be eliminated from subdivision 5 of section 1083, Hill’s Ann. Laws, so as to make it read as follows: “When real property is situated in the county, and no other county court has gained jurisdiction under either of the preceding subdivisions of this section.” To strike out the clause adverted to would be violative of the plain rules of construction, which require that effect must be given to the ordinary meaning of words employed in a statute unless it is clear that the lawmaking

power intended otherwise: *Crawford v. Linn County*, 11 Or. 482 (5 Pac. 738); *State v. Simon*, 20 Or. 365 (26 Pac. 170); *Baker v. Payne*, 22 Or. 335 (29 Pac. 787). To reject the words "devised by the testator," in subdivision 5 of section 1083, would render subdivision 1 of that section nugatory, as far as it relates to the inhabitancy of the testator as a condition precedent to the jurisdiction of a county court; and, in case the intestate died seised of real property in different counties of the state, the right of a county court to grant administration of such estate might possibly depend upon which one of the persons equally entitled to be appointed administrator should first reach the judge of a county in which any of such property was situated. It is not reasonable to suppose that the legislative assembly ever intended that jurisdiction to grant administration of the estate of an intestate should depend upon such a mode of securing it. Frances Slate not having devised any real property in Linn County, the county court thereof never had jurisdiction of the subject-matter; and, this fact being apparent from an inspection of the record, such court very properly set aside its order appointing the defendant administrator. The decree of the circuit court must therefore be reversed, and one entered here discharging the defendant as administrator of such estate. REVERSED.

Decided 31 March; modified 30 June, 1902.

WILSON'S GUARDIANSHIP.

CUTTING v. SCHERZINGER.

[68 Pac. 393, 69 Pac. 439.]

GUARDIAN'S ACCOUNTS—JURISDICTION OF PROBATE COURT.

1. A probate court has jurisdiction to settle the accounts of a guardian, upon the petition of a subsequently appointed guardian, whatever may be the rule upon the intervention of the sureties of the first guardian: *Herren's Estate*, 40 Or. 90, applied.

GUARDIAN'S ACCOUNTS—NECESSARY PARTIES.

2. In a proceeding to settle the accounts of a removed guardian without attempting to surcharge his accounts, but merely to determine whether additional credits should be allowed, the removed guardian is not a necessary party.

GUARDIAN'S ACCOUNTS—JURISDICTION TO DETERMINE.

3. A proceeding to settle the accounts of a removed guardian, and to determine whether he should be allowed further credits, as claimed by his sureties, is within the jurisdiction of the county court, and a recourse to a court of general equity jurisdiction need not be had.

EXPENDITURES OF WARD'S FUNDS.

4. Though a guardian ought not to incur expenses for the support of his ward without a direction from the county court, yet if he does incur such expenses, and clearly shows the necessity therefor, he should be allowed credit for such expenditures in the settlement of his accounts, if they are such as the court would have originally authorized.

SUFFICIENCY OF EVIDENCE.

5. The evidence adduced does not seem to justify the conclusion of the probate court that the guardian did expend for the care and support of his wards the sum allowed his sureties as a credit, and the decree will be modified by reducing the credit to \$462.

From Tillamook: REUBEN P. BOISE, Judge.

This is an appeal from a decree affirming in part an order of the county court settling a guardian's account. Some time prior to 1891 one Brady Wilson died, leaving a widow and five minor children. During that year the widow married C. G. Cutting, and he thereafter resided with the family on her homestead in Tillamook County until November, 1897. On October 26, 1895, he was appointed guardian of his stepchildren, aged from eight to fifteen years, and in March, 1896, received as such guardian from the estate of their grandfather \$1,746. On September 8, he filed an account showing the receipt of the money referred to, and an expenditure by him of \$104. About a year later he filed another report, in which he stated that he should be charged with an additional sum of \$83.97 received on account of his wards, and \$47.55 interest, and was entitled to a credit of \$152.05 for the expense of a trip to the State of Illinois on business connected with his guardianship and for attorney's fees while there. This latter account, being unsatisfactory to the court, was disallowed, and he was ordered to file an amended account by a certain date. On November 20, 1897, and before the time he was required to appear and file the amended account, Cutting left the state, and never afterwards appeared in court or filed any account of his transactions as guardian or statement of the condition

of the funds belonging to his wards, except that in September, 1898, he wrote a letter to the county clerk, in which he undertook to give a statement of his receipts and disbursements. This letter was filed with the papers in the case, but no action was ever had thereon by the county court, nor was it ever treated or regarded in any sense as an account. No account or pretended account filed by the guardian was ever allowed or approved by the county court, except possibly the first one, filed in September, 1896. On May 2, 1899, upon the petition of his bondsmen and Mrs. Cutting, he was removed as guardian, and Mrs. Cutting, the mother of the children, subsequently appointed in his place. On July 6 of that year, Cutting's bondsmen filed a petition in the county court, alleging, in substance, that he had expended a portion of the funds belonging to his wards for their support, maintenance, and education, and asking that he be credited therewith in the settlement of his accounts. Citation was issued and served on the wards and their mother, with whom they resided. On October 18, 1899, Mrs. Cutting, who had been appointed guardian, petitioned the court for an order approving, as a final account of Cutting, the statement contained in the letter from him to the county clerk in September, 1898, and at the same time filed an answer to the petition of the bondsmen theretofore filed. Upon a trial of the issues thus made, the county court found that Cutting's account should be credited with the sum of \$900.20 for money expended by him for the support, maintenance, and education of the wards, and \$100 for services as guardian. From this order, one of the wards, who had in the meantime become of age, and the guardian of the others, appealed to the circuit court, where the decree of the county court was affirmed in all particulars, except the allowance for services as guardian. From this decree an appeal has been taken to this court.

MODIFIED.

For appellants there was a brief and an oral argument by *Mr. Robert C. Wright*.

For respondents there was a brief and an oral argument by *Mr. B. L. Eddy*.

MR. CHIEF JUSTICE BEAN, after stating the facts in the foregoing terms, delivered the opinion of the court.

1. At the outset it is contended that the sureties on the guardian's bond cannot invoke the jurisdiction of the county court to settle the accounts of their principal, or for the allowance of credits therein. Whatever the rule may be in the case suggested is immaterial here, because the county court acted, not only on the petition of Cutting's bondsmen, but that of the subsequently appointed guardian, and even if the bondsmen could not intervene to protect their own interests, as they would seem to have a right to do [Woerner, Guardianship, p. 341, § 101; *In re Spath's Estate*, 144 Pa. 383 (22 Atl. 749); 15 Ency. Pl. & Pr. (2 ed.) 90], there can be no question but what the jurisdiction of the court was properly invoked by the guardian then in office: *Herren's Estate*, 40 Or. 90 (66 Pac. 688).

2. The claim is also made that Cutting is a necessary party to this proceeding; but there is no attempt to surcharge or falsify his statements or alleged accounts, so far as the actual receipts and disbursements shown thereby are concerned, or to charge him with any liability not disclosed. The single question is whether he should be allowed additional credits, and all parties interested in that controversy are before the court.

3. Again, it is urged that this is, in effect, an attempt to surcharge and falsify the accounts of a guardian, and that recourse must be had to a court of general equity jurisdiction for that purpose. As we have already suggested, no account or pretended account of Cutting was ever approved by the county court, unless, perhaps, the one filed soon after his appointment, and which merely contained a statement of the

amount of money received by him and some small items of expenditures. Moreover, the account, as finally settled and approved, is made up from those previously filed by the guardian, except one item of \$420.84, which he wrongfully claimed to have paid to one of his wards after she became of age, and another for money expended in the support and maintenance of his wards. Upon this record, we are clearly of the opinion that the county court had jurisdiction to make the order complained of.

4. The only question remaining, therefore, is whether, under the circumstances as disclosed by the testimony, the guardian should be credited with the amount so expended. It is the duty of a guardian to see that his ward is suitably maintained, and upon proper application therefor the county court may and will authorize the use of the principal of his ward's funds, as well as the income thereof, if necessary, for that purpose. The usual, and no doubt better, practice is to obtain an order authorizing the expenditure, and as a general rule a guardian cannot encroach upon the principal without such order; but it is believed this rule is not inflexible, so that if the income is not sufficient, and the ward's welfare requires it, the guardian may resort to the principal, and, if he has in fact used a part of it for the support and maintenance of his ward without authority of the court, it may and will, in a proper case, ratify such expenditures. If, however, he has taken this responsibility, he is required to make out as clear a case to obtain the order ratifying the expenditure as if he had applied for authority in advance. The true criterion in such case would seem to be whether the court would have antecedently authorized the expenditure: Woerner, Guardianship, p. 348, § 104; 15 Ency. Pl. & Pr. 100; *In re Beisel's Estate*, 110 Cal. 267 (40 Pac. 961).

It is vigorously contended, however, that because there is no evidence that Cutting intended to take credit for or charge his wards for their support and maintenance, no allowance can be made for that purpose. As a general rule, it may be conceded that when a stepfather voluntarily assumes the care and sup-

port of a stepchild he stands in the place of a parent, and is not entitled to reimbursement for its support and maintenance out of the separate estate of the child. There is no law, however, requiring him to do so; and, unless he voluntarily chooses to assume the duties of a parent, he is entitled to charge for its support and maintenance, and, if its guardian, to a credit in his accounts for any money expended for that purpose: *Gerber v. Bauerline*, 17 Or. 115 (19 Pac. 849). The vital question here is not whether a stepfather who supports and maintains his stepchildren from his own funds is entitled to reimbursement therefor from their estate, but whether he should be credited in the settlement of his accounts as their guardian with expenditures out of the money of his wards for such purpose. The claim of the petitioners and findings of the county court are to the effect that Cutting used a portion of the money belonging to his wards for their support and maintenance, and the only question is whether, if that be true, he should be allowed credit therefor. Originally, the power to appoint a guardian of the person and estate of a minor belonged to a court of chancery. In this country, however, as a general rule, such power has by the legislature been delegated or conferred upon particular courts, and in this state upon the county court: Hill's Ann. Laws, § 895. In the execution of the power, however, the county courts are governed in a large measure by the rules formerly applicable to similar proceedings in the courts of chancery, and the settlement of the accounts of a guardian in the county court is substantially the same as the settlement of the accounts of a trustee appointed by the general court of equity, and is to be determined on general equity principles. There are no hard and fast rules by which the court is bound. While it cannot be too strict and vigilant in investigating the accounts of a guardian where there are indications of bad faith or fraud, yet, in the absence of all indications of that kind, a guardian should not, in the settlement of his accounts, be held to the strict rules of evidence. As a general rule, full items with vouchers for all expenditures should be required, and credits ought not to be al-

lowed without them; but this is not indispensable, and in a clear case, where there is no doubt of the expenditures having been made nor of the guardian's good faith, vouchers may be dispensed with. Each case must necessarily depend upon its own particular facts, and on the equities thereof.

5. Now, it seems to us plain from the record of this cause that Cutting used a portion of his ward's money for their support, maintenance, and education, and there is much in the record to indicate that he intended his sureties should not have the benefit of a credit therefor. From the time of his marriage with the mother of his wards, he and the family lived on an unproductive "rough mountainous ranch," and, according to the testimony of his neighbors, they were, up to the time he received the money belonging to his wards, in straitened circumstances, if not absolute poverty. Mr. Goeres, a neighbor and wholly disinterested witness, testifies that up to that time the children were barefooted and ragged, and needed better food than they had; that Cutting's neighbors assisted him in work, as well as in food; that after his appointment as guardian he did but little work, but the children were better fed and clothed, and appeared in good circumstances. Mr. Rock, another witness, says that prior to his appointment Cutting had no cows and no money with which to buy food; that he made no secret of the fact that he was in poor circumstances; that for a time the children did not go to school for want of sufficient clothing to wear; that after his appointment and receipt of his wards' funds the children went to school, and had plenty of everything, although there was no discernible increase in Cutting's earnings. Mr. Walker, another neighbor, testified to substantially the same state of facts. The testimony of the bondsmen, who were Cutting's neighbors, and who went on his bond for the purpose of enabling him to obtain possession of the money belonging to his wards, "so that he could maintain them out of it," is all to the same effect. One of them says that prior to Cutting's possession of his wards' money the family was in very poor circumstances; had very poor food and clothing, and most of the food they had the last

winter before the money came was donated to them; that the place on which they lived was very rough, mountainous, and covered with brush and logs, except a very small portion thereof; that only two or three acres were tillable, and upon these he raised a little hay and vegetables, and that he had no stock or other means of income. There was a noticeable difference after he received the money belonging to his wards. The children went to school, and were well and comfortably dressed and fed.

Another says: "I was intimately acquainted with Mr. Cutting since he was first married to the present Mrs. Cutting, and ever since then my family and his family visited back and forth considerable. I had some considerable business with Mr. Cutting in a small way; that is to say, Mr. Cutting worked for me on several occasions, and from talk that we had I became well acquainted with his financial circumstances at the time. I furnished him with work for potatoes to support that family. I also gave him salt salmon,—as many as he wanted,—and made no account of the same, and I know that they lived without meat for months, and without tea or coffee for months, and that their principal food was salt salmon and potatoes. While Mr. Cutting was working for me, he told me it was a very hard matter for him to support those children, but that they had an estate coming to them from their father, and if this estate could be put in shape so that he could maintain them out of it that he could get along all right, and he asked me to go on his bond if he was appointed guardian for those children. In the first place, I did not like to go on his bond, but I afterwards consented, and went on his bond. After Mr. Cutting was appointed as guardian, some six months after he received the money, which he told me amounted to 1,700 and some odd dollars, the condition of his family before he was appointed was such that they had not proper clothing or proper food. The children were all barefooted and in a ragged condition generally, and after Mr. Cutting got this money there was a great change in the way those children were clothed and fed. I was at the house many times, both previous

and afterwards, that Cutting was appointed as guardian. * * * Cutting told me himself on several occasions that he did not know how in the world he would support that family. I do know that Cutting had no credit at the stores in our neighborhood, and I seen him have to give security before he could buy two sacks of flour and a pound of tea. I also know the family lived well and were clothed well after Cutting was appointed as guardian of them." The witness further testifies that Cutting did not work any after his receipt of his wards' money, and had no income except what he derived therefrom. If needful, other quotations could be made from the testimony, showing the same state of facts, and pointing irresistibly to the conclusion that after Cutting's possession of such funds he used a portion thereof for their support and maintenance. The exact amount so used is difficult, if not impossible, to determine from the record. No account thereof seems to have been kept by Cutting, or, if so, it was not accessible to his bondsmen. The county court found from the entire evidence that the expenditure amounted to at least \$7 a month for each child, and this finding was concurred in by the circuit court, and we are of the opinion that it is supported by the testimony. While it is difficult, if not impossible, from this record, to arrive at an accurate conclusion in the matter, it would be manifestly inequitable and unjust on that account to compel the bondsmen to make up the deficiency as shown by his alleged statement, without crediting him with the expenditures for the support and maintenance of his wards, when the evidence so clearly shows that he must necessarily have spent a considerable portion of their estate for that purpose.

Upon the whole, we are of the opinion that the conclusion of the county and circuit courts on the question is as nearly equitable and just as is possible under the circumstances. The decree from which this appeal is taken will therefore be affirmed.

Decided 30 June, 1902.

ON PETITION FOR REHEARING.

MR. CHIEF JUSTICE BEAN delivered the opinion.

The county and circuit courts allowed credit in the settlement of Cutting's account for money expended by him in the support, maintenance, and education of his wards, from March 11, 1896, to March 17, 1899, and, as no special question was made by appellant as to the time during which the allowance should have been granted, the court did not examine the record upon that point, naturally assuming that the amount only was in question. The petition for rehearing, however, calls attention to the obvious fact that sixteen months of the time covered by the findings of the county and circuit courts was after Cutting absconded and left the state, during which period it is manifest he did not contribute anything to the support of his wards. The findings and decree ought, therefore, to be modified to that extent. Mrs. Cutting testified that all the children lived at home from the time Cutting received the appointment as guardian, until he left the state, with the exception of Katie, who was home six months only. Cutting's account, therefore, should be credited for money expended by him for the support, maintenance, and education of Katie for six months, and twenty months each for the other three children, at \$7 a month, making a total credit of \$462, instead of \$900.20, as allowed by the county and circuit courts. The former opinion will be modified in this regard, but in all other respects it will be adhered to.

The court did not undertake to state the record in detail, but only the substance thereof. Whatever may be said of the sufficiency of the allegations in the petition of the bondsmen, and the regularity of the proceedings in the county court, there was certainly enough before that court, in the petitions, answers, and replies, to warrant it in exercising its undoubted jurisdiction to settle the accounts of Cutting as guardian.

REHEARING DENIED; MODIFIED.

Argued 25 November; decided 30 December, 1901.

BINGHAM v. LIPMAN.

[67 Pac. 98.]

40	363
140	409
40	363
45	573

PLEADING—DAMAGES FOR TRESPASS.

1. In actions for damages resulting from trespass it is allowable to plead all the circumstances accompanying the act and that constitute a part of the occurrence, so as to show the purpose and extent of the injury.

DUPPLICITY IN PLEADING.

2. Duplicity in pleading consists in setting forth and relying upon more than one cause of action; as, where plaintiff, who had been in defendants' employ, alleged that defendants unlawfully "conspired" for the purpose of extorting money from her, and that she was induced to enter their office, where she was charged with larceny of articles from their store, and threatened with arrest and disgrace, and that they locked her in the store, and kept her for several hours, and extorted money from her, the complaint was not bad for duplicity, as a series of unlawful acts aimed at and contributing to the injury complained of may be averred, without violating the rule against duplicity.

EVIDENCE OF DECLARATIONS AGAINST INTEREST.

3. It is always competent to give in evidence statements made by a party against his interest.

INSTRUCTION LIMITING APPLICABILITY OF EVIDENCE.

4. Where testimony is admitted that is claimed to be incompetent as against some of several parties, the objectors should ask an instruction limiting its applicability.

PRESENTING THEORIES OF THE RESPECTIVE PARTIES.

5. Parties are entitled to have their respective theories of a case fairly presented to the jury, but the manner of the presentation rests with the judge, and if he chooses to set forth certain opposing claims in close association it is his privilege to do so.

FORCE NECESSARY TO CONSTITUTE UNLAWFUL IMPRISONMENT.

6. Submission to threatened and reasonably apprehended force constitutes an unlawful imprisonment—actual force need not have been used nor threatened.

APPEAL—PRESUMPTION OF SUFFICIENCY OF EVIDENCE.

7. Where the record on appeal does not purport to contain all the evidence on a point on which an instruction was given, it will be presumed that the evidence was sufficient to support the instruction.

PUNITIVE DAMAGES IN TORT ACTIONS.

8. In actions for tort punitive damages may be allowed under proper circumstances: *Sullivan v. Oregon Ry. & Nav. Co.* 12 Or. 392; *Day v. Holland*, 15 Or. 464, and *Osmun v. Winters*, 30 Or. 177, followed.

TORT BY CORPORATION—LIABILITY FOR ACTS OF OFFICERS.

9. Where the officers of a corporation, who exercise the whole executive power, participate in and direct all that is done in the commission of a tort,

their malicious, wanton, or oppressive intent may be treated as the intent of the corporation, and it may be compelled to respond in punitive damages.*

INSTRUCTIONS MUST BE REASONABLY CONSTRUED.

10. The instructions to a jury must be reasonably construed in the light of the evidence that has been received, and the two should be considered together; as, where the evidence showed that the chief executive officials of a corporation either did or authorized all the acts constituting a tort, instructions regarding the liability of the corporation for punitive damages must be interpreted accordingly, and are not to be deemed erroneous because they may be broad enough to make the corporation liable in such damages for the acts of any of its officials, regardless of rank.

LIABILITY OF TORTFEASORS.

11. In an action of tort against a corporation and its managing agents, on whose conduct its liability depended, a verdict against the corporation only is not void, since the defendants are jointly or severally liable.

ACTION FOR FALSE IMPRISONMENT—PLEADING CONSPIRACY.

12. In an action of damages against several persons for false imprisonment an allegation of conspiracy may be treated as matter in aggravation or explanation, and is not an essential averment, since the recovery may be joint or several.

From Multnomah: ALFRED F. SEARS, JR., Judge.

Action by Ada Bingham against Lipman, Wolfe & Company, Isaac N. Lipman, and Adolph Wolfe. The defendant Lipman, Wolfe & Company is a corporation engaged in conducting a department store in the City of Portland. The defendants Adolph Wolfe and Isaac N. Lipman are, respectively, its vice president and secretary. They are also its managing agents, and, together with Solomon Lipman and Will Lipman, own all the stock of the corporation. For some time prior to March 30, 1899, the plaintiff was employed by the firm as a clerk in one of its departments. About 5 o'clock in the afternoon of the day named, defendant Lipman called her into the office and accused her of having embezzled and appropriated to her own use a portion of the money received by her on the sale of some articles belonging to the firm,—especially a corset sold the day before. According to her testimony, she was compelled to remain in the store without food or drink, or an opportunity of seeing or consulting her friends, until twenty-five

*NOTE.—See article, Exemplary Damages in Actions Against Corporations, 55 Cent. Law Jour.—REPORTER.

minutes after 11 o'clock at night, when, in order to obtain her liberty, she was compelled by threats and intimidation to promise to pay to the firm \$92.50,—the estimated value of the goods alleged to have been stolen by her. On the next day she called at the store and paid \$30 of her own money and \$5 which belonged to the firm, but thereafter refused to make any further payment, and a few days later brought this action against the corporation and Lipman and Wolfe individually.

The complaint, after setting out the corporate capacity of the defendant Lipman, Wolfe & Company, the official relations of the other defendants thereto, and the employment of the plaintiff, avers, in substance, that the three defendants unlawfully and maliciously conspired together for the purpose of extorting money from the plaintiff, and, to that end, unlawfully to charge her with the crime of larceny in the storehouse of the defendant corporation; that, in pursuance of such conspiracy, she was induced to go to their private office, under the pretext that the managers desired to see and speak to her on business; that they then and there charged her with having committed larceny in the store, and threatened that she would be arrested and publicly charged with the crime, and thereby disgraced and held up to the contempt of the community, unless she admitted her guilt and made restitution for the property alleged to have been stolen; that, notwithstanding such threats, she protested her innocence, and refused to admit that she was guilty of any offense or to turn over any property whatever, whereupon the defendants caused her to be locked up in the store, and to be kept therein from 6 until 11 o'clock, without food or drink, during which time she was not permitted to see any of her friends; that she remained in the store so unlawfully imprisoned during all the time mentioned, and, in order to purchase her freedom, was compelled by the defendants to release her claim to \$9 due her for wages, and to promise to pay an additional sum of \$92; that the plaintiff was thus maliciously and wantonly deprived of her liberty for about the space of five hours, was accused by the defendants of having committed the crime of larceny, and threat-

ened with the disgrace of arrest, and was thereby compelled, in order to be released from her imprisonment, to pay them the money referred to; that the defendants, one and all, knew that plaintiff had committed no crime whatever, and that the conspiracy and all of the acts done thereunder by the defendants were with the sole intent on their part of extorting money from her; that, by reason of the acts and conduct of the defendants, she has been and is damaged in the sum of \$10,000. A motion to strike out the complaint, and also portions thereof, upon the ground that two causes of action, viz., for false imprisonment and extortion, were improperly united, was overruled. A demurrer thereto upon the same ground was also overruled.

Defendants answered jointly, denying the material allegations of the complaint, and, for an affirmative defense, alleged that, while the plaintiff was employed by the defendant Lipman, Wolfe & Company, she embezzled and fraudulently converted to her own use money and property belonging to the firm in the aggregate amounting to \$92.75, which she voluntarily and without solicitation on the part of the defendants, or any or either of them, offered to repay, and did, on the thirty-first of March, after the matters set forth in the complaint had occurred, voluntarily and without solicitation on the part of the defendants, pay to the firm the sum of \$30. A reply was filed, putting in issue the new matter alleged in the answer.

A trial resulted in the following verdict:

“Ada Bingham

v.

Lipman, Wolfe & Co.”

We, the jury impaneled to try the above-entitled cause, find for the plaintiff, and assess her damages at \$2,000.”

Judgment was thereafter rendered upon this verdict in favor of the plaintiff and against the defendant corporation only, from which it appeals.

AFFIRMED.

For appellant there was a brief over the name of *Cotton, Teal & Minor*, and *James Gleason*, with an oral argument by *Mr. Wirt Minor*.

For respondent there was a brief and an oral argument by *Mr. Henry E. McGinn*.

MR. CHIEF JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

1. It is contended that two causes of action are improperly united in the complaint,—one, for false imprisonment; the other, for conspiracy to extort money. But in an action for trespass the plaintiff may charge and prove all the circumstances accompanying the act, and which were a part of the *res gestae*, in order to show the temper and purpose with which the trespass was committed, and the extent of the injury, under the rule that a series of unlawful acts, all aimed at a single result, and contributing to the injury complained of, may be averred in the complaint without violating the rule against duplicity: *Oliver v. Perkins*, 92 Mich. 304 (52 N. W. 609); *Rice v. Coolidge*, 121 Mass. 393 (23 Am. Rep. 279).

2. To constitute duplicity in a pleading, it is not enough that it appears therefrom that the plaintiff has more than one cause of action, but it must appear that he relies on more than one as a ground of recovery. “In order to constitute duplicity,” says the Supreme Court of Connecticut, “it is not sufficient that a count in a declaration shows merely that the plaintiff has various causes of action against the defendant, although the contrary might be inferred from the general and loose definitions of duplicity in some of the elementary treatises on pleadings. It is necessary, further, that those various causes of action, or more than one of them, should be claimed and relied on as distinct grounds of recovery. * * * For if it appears that the plaintiff seeks to recover upon only one of them, and makes no claim on any of the others, as a distinct, additional, or independent ground of recovery, the mere circumstance that he has other valid claims against the de-

fendant, which he might, but does not, seek¹ to enforce in the suit, ought not to deprive him of a recovery on the cause of action on which alone he seeks to recover. And in such a case there must be no multiplicity of issues, to avoid which duplicity is discountenanced": *Raymond v. Sturges*, 23 Conn. 133, 145. In *Brewer v. Temple*, 15 How. Prac. 286, the complaint alleged that the defendant made an assault upon the plaintiff, and then and there published and declared in the presence and hearing of other persons certain slanderous words of him, whereby he was greatly injured in his person, character, feelings, and circumstances. Upon demurrer to the complaint on the ground that two causes of action—one for assault and battery, and the other for slander—were improperly united, the court held the objection not well taken, and that the complaint contained but a single cause of action, because all the allegations related to a single transaction, and were a part of the *res gestae*. The same rule is announced by Mr. Bliss in his work on Code Pleading (2 ed.), § 292, and by the following authorities: *Hildebrand v. McCrum*, 101 Ind. 61; *Conaughty v. Nichols*, 42 N. Y. 83; *Miller v. Bayer*, 94 Wis. 123 (68 N. W. 869).

3. On the trial a Mrs. Jester, who had been charged by the managing officers of the corporation with having embezzled and appropriated to her own use certain property belonging to the firm, was called as a witness. It appears from the bill of exceptions that the plaintiff offered to show by her that on the thirty-first day of March, 1899, the defendant Wolfe told her they had made an agreement with the plaintiff to pay \$92.50, and if she (Mrs. Jester) would pay \$100 her offense would be kept from the public, but, if not, they would send her "over the road to the fullest extent of the law," and at the same time said to her: "You have got a husband to support you, and you have some property. Out there in the outer office there is a woman [referring to the plaintiff]; she has no money; she has nothing at all; and still we made her pay us \$30, and she is going to pay us what little she is able to earn from now on." Objection to the admission of such testimony on the ground that

it was immaterial, irrelevant, and incompetent was overruled, and such ruling is assigned as error. The record, however, does not show that the evidence was in fact admitted, or that Mrs. Jester gave any testimony in reference to the matters mentioned. It would seem, therefore, that the assignment of error could be disposed of under the rule that where the record on appeal does not show how a question permitted by the court against objection was answered, or whether it was answered at all, the ruling of the trial court will not be disturbed: *Lovell v. Davis*, 101 U. S. 541; *Turner v. United States*, 66 Fed. 280 (13 C. C. A. 436); *Cecconi v. Rodden*, 147 Mass. 164 (16 N. E. 749); *Haney v. Clark*, 65 Tex. 93; *Carpenter v. Corinth*, 58 Vt. 214 (2 Atl. 170); *Devoe v. Singleton*, 80 Md. 68 (30 Atl. 614). But conceding the question to be properly here, and that the witness testified substantially as stated in the offer, no error was committed in the admission of the evidence. It was a declaration by defendant Wolfe against his interest, and, as such, competent against him.

4. If irrelevant or incompetent as to the other defendants, the remedy was by a request for an instruction from the court limiting its operation to the defendant Wolfe alone: *Ponder v. Cheeves*, 104 Ala. 307 (16 South. 145); *Mighell v. Stone*, 175 Ill. 261 (51 N. E. 906); *Snyder v. Lindsey*, 92 Hun, 432 (36 N. Y. Supp. 1037); *Jno. Hutchinson Mfg. Co. v. Pinch*, 107 Mich. 12 (64 N. W. 729, 66 N. W. 340); *Miller v. Potter*, 59 Ill. App. 125.

5. The defendants requested the court to charge the jury: "If you find from the evidence that the plaintiff remained in the store of Lipman, Wolfe & Company, on the evening and night of the thirtieth of March, 1899, voluntarily and of her own free will and accord, then I charge you that this does not constitute an unlawful imprisonment as charged in the complaint." This instruction was given as requested, but the court, on its own motion, added thereto the following: "Submission to the threatened and reasonably apprehended use of force is not to be considered as a consent to the restraint by

the one claiming to have been imprisoned." Objection is made to the modification on the ground that the defendants were entitled to have their theory of the case submitted to the jury "without any connection with other matters," and because there was neither allegation nor proof that force was used to compel the plaintiff to remain in the store. The rule is unquestioned that every litigant is entitled to have his theory of the case, within the pleadings and proof, fully and fairly submitted to the jury, but he cannot complain if the theory of the other side is submitted at the same time.

6. The modification of the instruction was proper and within its pleadings. It is not based on the theory that actual force was used, but is to the effect that submission to reasonably apprehended force is sufficient to constitute unlawful imprisonment, although no actual force may have been used or threatened; and this is in accord with the rule of law upon the subject: 12 Am. & Eng. Ency. Law (2 ed.), 734.

7. The record does not purport to contain all the evidence on this point; hence we must assume there was sufficient to support the instruction.

8. [The defendants requested the court to charge the jury: "In estimating the damages done to the plaintiff by the defendant corporation, Lipman, Wolfe & Company, you cannot award the plaintiff any sum of money by way of punishing said defendants." The court refused to give the instruction as requested, but charged the jury that, if they found for the plaintiff, they might, if actual malice was shown, in addition to compensatory damages, allow a further sum by way of punitive or exemplary damages. This brings up the disputed question as to whether punitive or vindictive damages are to be allowed in cases of tort, but, as we understand it, this court is committed to the affirmative of the proposition:] *Sullivan v. Oregon Ry. & Nav. Co.* 12 Or. 392 (7 Pac. 508, 53 Am. Rep. 364); *Kelley v. Highfield*, 15 Or. 277 (14 Pac. 744); *Day v. Holland*, 15 Or. 464 (15 Pac. 855); *Osmun v. Winters*, 30 Or. 177 (46 Pac. 780). And as said by the Supreme Court of Wisconsin in *Brown v. Swineford*, 44 Wis. 282 (28 Am. Rep. 582):

“If a change should now be made, it lies with the legislature, rather than the court, to abrogate or modify a rule running through the entire body of the reports of this state. As was once well observed, courts cannot be always inquiring into the original justice or wisdom of rules long established and accepted.”

9. It is argued, however, that the rule should not be applied in an action against a corporation for an injury caused by the misconduct of its agents or servants, unless the act was previously authorized or subsequently ratified by the board of directors or other governing body of the corporation. Upon this question there is a conflict of judicial opinion. Mr. Thompson in his late work on corporations, expresses the view that the doctrine maintained by the majority of the state courts is that “the rule of *respondeat superior*, which makes a corporation liable for the malicious torts of its agents or servants, makes it liable in exemplary damages for such torts, whether the act were originally authorized or subsequently ratified by its governing body or not”: 5 Thompson, Corp. § 6384. For “the true theory is that the rule of exemplary damages is a rule, not of logic, but of public safety; that the public know the corporation only through its ministerial agents and servants; that the corporation touches the public only by the hands of these agents and servants; and that consequently, so far as the public rights are concerned, they are to be regarded as the corporation, precisely as the doctrine of *respondeat superior* identifies the principal and his agent for the purpose of protecting third persons:” 5 Thompson, Corp. § 6389. Whatever the true rule may be, however, where it is sought to charge a corporation with exemplary damages on account of the malicious acts of its subordinate agents, there can be no room for controversy that where, as in this case, the officers actually wielding the whole executive power of the corporation participated in and directed all that was planned and done, their malicious, wanton, or oppressive intent may be treated as the intent of the corporation itself, for which it is liable to answer

in exemplary damages: *Denver, etc. R. Co. v. Harris*, 122 U. S. 597 (7 Sup. Ct. 1286).

10. A contention is made that the instructions of the court were broad enough to make the corporation liable in exemplary damages for the malicious acts of any and all of its agents, without regard to their rank or authority. But the instructions must be interpreted in view of the testimony, which showed that the injury complained of by the plaintiff was either done or authorized by the managing agents and sole representatives of the corporation in the state, and consequently was the act of the corporation itself. Mr. Lipman, the secretary and one of the managing agents, was the principal actor in the matter; and, although the testimony is not all in the record, there is sufficient to indicate that his acts were with the knowledge and approval of Mr. Wolfe, the vice president of the corporation. Wolfe was present during part of the time plaintiff was in the office being interrogated by Mr. Lipman, and did not, on behalf of his principal repudiate Mr. Lipman's acts, but, on the contrary, advised her to comply with his wishes, because he "is a very hard man, and will do just exactly what he says he will do." So we think there is enough in the record to show beyond controversy that both Lipman and Wolfe participated in and sanctioned all that was done, and their acts were binding upon their principal, the defendant corporation.]

The next assignment of error, based on the alleged misconduct of counsel, was not pressed at the argument. We have nevertheless examined the record, and are of the opinion that the assignment presents no reversible error.

11. And finally it is contended that the verdict is insufficient to support the judgment, because it is against the corporation only, and not against the other defendants, who are admitted to have been its managing agents, and through whose conduct it became liable, if at all. This apparent inconsistency was a proper subject for consideration by the trial court on the motion for a new trial, but it does not render the

verdict void. The action is for tort, and the jury had authority to render a verdict against all or any of the defendants.

12. The argument is made, however, that because the complaint alleged a conspiracy, and the court charged the jury that the plaintiff could not recover unless a conspiracy was proved, the verdict was contrary to the pleadings and the instructions of the court, and therefore cannot stand. In an action of this kind, proof of a conspiracy is not essential to a recovery. It may be pleaded and proved as aggravating the wrong, and enabling the plaintiff to recover against all as joint tortfeasors. If he fails in the proof, however, he may still recover against such as are shown to be guilty of the tort without such agreement. The question arose in *Parker v. Huntington*, 2 Gray, 124,—an action against two for maliciously conspiring to have the plaintiff indicted for perjury,—and the court said: “The charge of conspiracy is mere surplusage, intended and used as matter of aggravation, and therefore not necessary to be alleged or proved. The gist of the action is not the conspiracy, but the damage done to the plaintiff by the acts of the defendants; and this is equally great, whether it be the result of a conspiracy, or of the act of a single individual. The insertion in the declaration * * * that the acts done were in pursuance of a conspiracy does not change the nature of the action. It is nevertheless an action on the case, and is to be tried and determined upon the well-settled rules applicable to that form of action.” And the same ruling was made in *Keit v. Wyman*, 67 Hun, 337 (22 N. Y. Supp. 133); *Davis v. Johnson*, 101 Fed. 952 (42 C. C. A. 111); *Doremus v. Hennessy*, 62 Ill. App. 391; *Van Horn v. Van Horn*, 52 N. J. Law, 284 (20 Atl. 485, 10 L. R. A. 184). See, also, 4 Ency. Pl. & Pr. 738. If the defendant corporation was guilty of the wrong charged, it cannot complain because the case was tried and submitted upon the erroneous theory that proof of a conspiracy was essential to a recovery, since such theory is more favorable than it has a right to ask.

The judgment is affirmed.

AFFIRMED.

Argued 18 December, 1901; decided 13 January, 1902.

PACIFIC LUMBER COMPANY v. PRESCOTT.

[67 Pac. 207.]

POSITION OF ONE CONTRACTING WITH A RECEIVER.

1. Persons making contracts with receivers or bidding at receivers' sales thereby subject themselves to the jurisdiction of the court that appointed the receiver, and become entitled to notice and a hearing on matters affecting their rights.

RIGHT TO ANNUL A RECEIVER'S CONTRACT.

2. Where a receiver contracts to sell property, and the buyer, with the assent of the receiver and the approval of the court, assigns the contract to a third person who stipulates to carry out all the terms of the contract, the latter becomes a party to the proceeding in which the receiver was appointed, and subjects himself to the jurisdiction of the court, so as to be bound by an order afterwards rendered annulling the contract.

CONSTRUCTION OF A CONTRACT OF SALE.

3. A contract for the sale of a certain quantity of lumber at a stipulated price per thousand provided that if either party breached the contract it should be void, and for the purpose of estimating the amount due in case of partial performance a certain higher rate per thousand was agreed on. The title of the lumber was to vest in the buyer as fast as paid for. *Held*, that though title vested in the buyer as payments were made, and before delivery, it only attached to such a quantity, in case of a breach, as could be secured by the payment of the higher rate agreed on.

DEFAULT IN COMPLIANCE WITH CONTRACT.

4. A receiver, having contracted to sell a certain quantity of lumber, of different grades, at a uniform price; a higher price to be charged in case of partial performance and breach; payments to be made at stated intervals,—cited the buyer to show why the contract should not be annulled for non-payment of an installment, and the court gave him ten days in which to make the payment. *Held*, that the fact that the buyer, before expiration of the ten days, ordered the receiver to deliver the cheaper grade of lumber, which was refused, did not excuse him from his default, and throw the default on the receiver, since, if this were so, the buyer could claim the best quality, as well as the poorest, and secure it at the uniform price, to the extent of the advance payments made by him, despite his default.

APPEAL—POWER TO DIRECT A PARTICULAR JUDGMENT.

5. On appeal from a judgment in a law action tried before a judge alone, the supreme court may remand the case with a direction to enter a particular judgment, if all the facts have been found; but if no finding has been made on a material point, the case must go back for a new trial.

From Multnomah: ARTHUR L. FRAZER, Judge.

Action by the Pacific Export Lumber Company against A. Prescott and others. From a judgment for plaintiff, defendants appeal.

REVERSED.

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48 314

For appellants there was a brief over the name of *Chamberlain, Thomas & Kraemer*, with an oral argument by *Mr. Geo. E. Chamberlain*.

For respondent there was a brief over the name of *Williams, Wood & Linthicum*, with an oral argument by *Mr. Geo. H. Williams*.

MR. JUSTICE MOORE delivered the opinion.

This is an action to recover the sum of \$788.74. It is alleged in the complaint that on December 1, 1896, John Gruber, as receiver of the Capital Lumbering Company, a corporation, entered into a contract with R. D. Jones whereby he sold to the latter a quantity of lumber, supposed to contain about 1,000,000 feet, and known as "merchantable and better quality," then near Winlock, Washington, for the sum of \$3.60 per thousand, on account of which \$500 was then to be advanced, and a like sum to be paid on the first of each month thereafter until the value thereof was fully paid, and Jones was also to pay the expense incurred in planing and kiln-drying such part of the lumber as he might order dressed or dried; that, on the day said contract was entered into, Jones, with Gruber's consent, assigned all his interest therein to plaintiff, a corporation, which paid the several installments to and including April, 1897, amounting to \$2,500; that on July 7, 1897, plaintiff had received lumber of the value of \$750.07, and incurred an expense of \$314.89 for planing and kiln-drying, leaving due it from Gruber 398,621 feet, which it on that day sold to the defendants, A. Prescott, J. A. Veness and L. J. Furber, partners as Prescott, Veness & Company, at \$3.60 per thousand, to whom Gruber, prior to October —, 1897, delivered 179,527 feet, of the value of \$646.30, and thereafter 219,094 feet thereof at the contract price of \$788.74, no part of which latter sum has been paid.

The answer denied the material allegations of the complaint, and, for a separate defense, averred that the defendants in July, 1897, entered into a contract with plaintiff whereby they

agreed to purchase all the "merchantable and better quality" of lumber which it then owned near Winlock, Washington, at \$3.60 per thousand, to be inspected and delivered to them by Gruber, from whom they received prior to October 18, 1897, 179,527 feet, of the value of \$643.30, which sum they paid plaintiff, whereupon it refused to deliver to them any more lumber under the terms of its contract. For a second defense, it is alleged that plaintiff ought not to be permitted to aver that after October —, 1897, the defendants received any lumber on its account, or that they owed it \$788.74, or any sum, for that one Ida Hining having commenced a suit in the superior court for Lewis County, Washington, against the Capital Lumbering Company, a corporation, Gruber was appointed receiver thereof; that, having duly qualified as such, he on December 1, 1896, entered into a contract with R. D. Jones, which he on that day, with Gruber's consent, assigned to plaintiff, which agreed to keep and perform the terms and conditions thereof; that, plaintiff having neglected to pay the installment of \$500 maturing May 1, 1897, Gruber on June 3 of that year filed a report in the court and cause in which he was appointed receiver, praying that a citation issue requiring plaintiff to show why its contract with him should not be forfeited by reason of the failure to comply with the terms thereof; that, a citation having been issued, plaintiff's attorney, in response thereto, filed an answer controverting the material averments of the petition, and alleging that, by reason of the lumber falling far below the estimated quantity plaintiff had paid for nearly all the specified quality that could be secured under the contract, which ought not to be canceled; that the court on June 23, 1897, upon the issue thus made, found that the "merchantable and better lumber" remaining was of the value of between \$1,300 and \$1,500, and decreed that plaintiff pay the installment of \$500 within ten days therefrom, or that in default thereof the contract be declared forfeited by the receiver, and that, no part of said sum having ever been paid, the decree of forfeiture became final; that thereafter proceedings were instituted in the Supreme

Court of Washington by that state, upon the relation of plaintiff herein, against the judge of said superior court and Gruber, reciting the facts involved in said petition and answer, and the decree based thereon, whereupon an alternative writ of prohibition was issued, but, a demurrer thereto having been sustained October 15, 1897, the proceeding was dismissed; that the superior court for Lewis County, Washington, and the supreme court of that state are courts of general jurisdiction, and said proceedings had therein were duly conducted according to the laws of that state and the rules of said courts, and that the contract mentioned in such proceedings is the agreement referred to in plaintiff's complaint; that the only lumber plaintiff was entitled to under said contract and the decrees of said court was 179,527 feet, which quantity the defendants received and paid it therefor, and that any other lumber secured by them after October 18, 1897, was received from Gruber, with whom they settled therefor.

The reply denied the material allegations of new matter in the answer, and averred that the defendants ought not to be permitted to allege that they received only 179,527 feet of lumber from the plaintiff, for, in answer to a request for a statement, they wrote to plaintiff on November 4, 1897, that prior to October 19 of that year they had received 181,000 feet, and six days thereafter 80,000 feet. The reply admits that said proceeding were had in the superior court for Lewis County, Washington, but denies that such court had power to require the payment of any part of the installment maturing May 1, 1897, or to declare a forfeiture of the contract in case of the nonpayment thereof, or that said decree had become final or binding upon plaintiff.

A trial was had without the intervention of a jury, and, the plaintiff having introduced its evidence and rested, the defendants moved for a judgment of nonsuit, which being overruled, and an exception allowed, they introduced their testimony, whereupon the court found the facts in accordance with the allegations of the complaint, except that plaintiff had rendered defendants a statement of account, claiming for the

lumber received after October 19, 1897, only the sum of \$758.74, for which judgment was given, and defendants appeal.

It is contended by defendants' counsel that Jones having assigned his interest in the contract for the purchase of the lumber to plaintiff, which agreed to keep and perform his engagements, and such transfer having been consented to and ratified by the receiver and approved by the court, plaintiff thereby became a party to such contract, and subjected itself to the jurisdiction of the court, which was authorized to compel it to fulfill its obligations, or for a failure thereof to declare the contract forfeited, and, the court having done so, its order evidencing the exercise of such power became final; that this action is a collateral attack on such judgment; and that, these facts having been disclosed by plaintiff's evidence and the admissions in the pleadings, an error was committed in overruling the motion for a judgment of nonsuit. The evidence introduced at the trial shows that Ida Hining having commenced a suit in the superior court for Lewis County, Washington, against the Capital Lumbering Company, a corporation, John L. Gruber was appointed receiver thereof, who on December 1, 1896, entered into a contract with R. D. Jones by the terms of which he agreed to sell and deliver to the latter all the "yard stock," commonly known as "merchantable and better quality," of lumber, supposed to be 1,000,000 feet, then on the mill yard and dock and in the sheds and kiln of the Capital Lumbering Company at Winlock, in said state, and also such further quantity of yard stock as might be manufactured in the ordinary operation of said corporation's mill, in cutting the remainder of a cargo of lumber for a ship then lying at Kalama, in said state; Jones agreeing to take the whole thereof and promising to pay therefor \$3.60 per thousand feet free on board the cars at Winlock, and also to pay such additional cost as might thereafter be incurred at his request in dressing and drying any part thereof; \$500. to be paid down and a like sum payable on the first day of each month thereafter until the whole sum due for said lumber, as

well as for the dressing and drying thereof, was paid; no time having been specified in which the lumber was to be removed.

The said agreement, in which Gruber and Jones are denominated parties of the first and second parts, respectively, contains the following stipulation: "Provided, and it is hereby expressly understood and agreed, that the party of the first part shall not, under this contract, be required to deliver at any time any quantity or portion of said lumber in excess of the amount of lumber then fully covered by payments theretofore made to him by said party of the second part or his assigns; and for the purpose of ascertaining whether or not any required shipment of said lumber would be in excess of the amount covered by all payments which may theretofore have been made, the value of all prior shipments made hereunder shall be estimated by the current market prices of lumber of grades similar to the grades included in such prior shipments as disclosed by the invoices thereof, and not by the average rate of \$3.60 per thousand feet hereinbefore mentioned. Should the party of the second part or his assigns desire and order shipments of lumber to be made more rapidly than the monthly payments herein specified would fully cover on the basis of reckoning above provided, the said party of the second part hereby promises and agrees to and with the party of the first part to pay cash upon delivery of each car load thereof at current market prices for such grades of lumber, and such payment shall be credited upon the aggregate amount due to the first party under this contract. * * * It is further mutually agreed that the failure of either party hereto to keep and perform each and every covenant and agreement herein agreed to be kept and performed shall render this contract null and void, and for the purpose of estimating the amount of money due said first party for shipments of lumber hereunder in case of partial performance the following schedule of prices is hereby mutually agreed upon, to wit: For common rough, \$3.50 per thousand feet, board measure; for No. 2 rough, \$5.50 per thousand; for No. 1 rough, \$9.50 per thousand; and both No. 1 and No. 2 rough shall in-

clude flooring, rustic, or ceiling stock.” Jones, on the day this agreement was entered into, assigned all his interest therein to the plaintiff, which stipulated faithfully to keep and perform, “in precise manner and form as in said contract provided,” his part thereof, which assignment, having also been consented to and signed by Gruber, as a party thereto, contained the following stipulation: “And the said John L. Gruber, as receiver of the Capital Lumbering Company aforesaid, the said party of the first part in said contract, does hereby consent and agree to the foregoing transfer and assignment by said Jones to said Pacific Export Lumber Company, and in consideration of the premises, and of the covenants and agreements of said Pacific Export Lumber Company, as herein and in said contract expressed, and of the faithful performance thereof, promises and agrees to and with said Pacific Export Lumber Company to faithfully perform and keep each and every of the agreements and covenants on his part in said contract agreed to be kept and performed; and it is mutually agreed by and between said Gruber, as receiver, etc., and said Pacific Export Lumber Company, that the lumber agreed to be sold under the said contract shall become the property of, and the title thereto shall be completely invested in, said Pacific Export Lumber Company as the same shall be paid for according to the terms of said contract.” Plaintiff on the day the contract was entered into advanced the sum specified therein, and each month thereafter until and including April, 1897, paid the sum agreed upon, such payments aggregating \$2,500.

Gruber, in pursuance of the terms of his contract, shipped lumber in car-load lots as ordered by plaintiff, and on April 22, 1897, wrote from Winlock to plaintiff in Portland, Oregon, that a car could be had the following Saturday, but that there was not sufficient lumber to fill it, saying: “We are short on this order 14,858 feet No. 2 flooring, 19,344 feet No. 3 flooring, 15,000 feet No. 4 ceiling. Kindly advise by return mail what to do to fill this last car.” The next day plaintiff wrote Gruber a letter, from which an excerpt is taken, as follows:

"We don't quite understand what you say about shortage. Do you mean that there is not enough lumber of the right quality in 1x4? If so, we shall have to let No. 1 go forward as No. 2, and No. 2 in place of No. 3, as far as necessary. We inclose a memorandum of the amount of 1x4 on hand, according to Mr. Lewis' inventory, together with a list of what we have taken, showing that there ought to be enough 1x4 left to fill the balance of order No. 31. If there isn't, then there must have been something radically wrong in the inventory." A summary of the schedule referred to shows that there was estimated to have been in the mill yard at the time of plaintiff's purchase 123,396 feet of 1x4 rough lumber, Nos. 1, 2, and 3, and 35,725 feet of dressed flooring, ceiling, and culls, and that, 63,941 feet of the former and 14,756 feet of the latter having been received, there should be remaining 59,455 and 20,996 feet, respectively. Gruber, in answer to this letter, wrote plaintiff as follows: "Since receiving yours of even date have heard from Mr. Vincent, who has charge of the yard. He says there are about 25,000 1x4 strips left, fit for sheathing only, and 8,000 worked 1x4, of which about one half are culls." Plaintiff's agents, believing from these letters that the sum of \$2,500 so advanced by their principal paid for nearly all the material of the specified quality that could be secured under the contract, declined to pay any part of the installment maturing May 1, 1897, until the remainder could be measured; the plaintiff having received, including a lot delivered on the thirteenth of that month, lumber of the value of only \$750.07, at \$3.60 per thousand, and incurred an expense of \$314.91 for planing and kiln-drying it, thus overpaying the sum of \$1,435.02, if the price of the lumber be computed at \$3.60 per thousand.

Gruber, on June 3, 1897, filed a report in the case of *Ida Hining* against the Capital Lumbering Company, reciting the terms of the contract for the sale of the lumber, the payments made by plaintiff thereunder, its default, and the alleged reason assigned therefor; that he had caused to be made as careful an estimate of the lumber sold as was possible without

repiling it, and ascertained that it originally consisted of about 900,000 or 1,000,000 feet, of which only about sixty-five per cent had been paid for, and asked that plaintiff might be cited to show why the contract should not be declared void by reason of the default in the payment of said installment, "and a time fixed in which the lumber bought and paid for, but not delivered, and the title of which vests in the Pacific Export Lumber Company, be removed or segregated from the lumber remaining in the hands of your receiver." A citation having been issued, the plaintiff, in response and for a return thereto, averred that the lumber of the quality so purchased by it never exceeded 710,000 feet, of the value of \$2,556, and that, having paid on account thereof the sum of \$2,500, there was a great uncertainty as to whether any other sum would be due under the contract, and that the doubt in this respect could not be resolved until the lumber was measured, but, when the quantity was ascertained, plaintiff was ready, able, and willing to pay therefor according to the terms of its agreement. The issue thus presented having been tried by the superior court for Lewis County, Washington, it found on June 23, 1897, that at the time said default occurred the receiver had in his possession a large quantity of "merchantable and better lumber," of the value of between \$1,300 and \$1,500, so purchased by plaintiff herein, which was ordered to pay the receiver the sum of \$500 within ten days therefrom; that upon its failure to comply therewith the receiver was directed to declare the contract for the purchase of the lumber forfeited and of no effect. Plaintiff on June 30, 1897, and before the forfeiture of the contract became final, requested Gruber to load upon cars the merchantable lumber remaining, but he refused to comply therewith. Plaintiff, not having paid any part of the installment as ordered by the court, and contending that the title to the lumber, at \$3.60 per thousand, vested in it as the payments therefor were made, entered into a contract with the defendants July 14, 1897, whereby they agreed to pay it the sum of \$3.60 per thousand for the remainder of the lumber so purchased, and to deliver in part exchange

therefor at Kalama, Washington, 200,000 feet of good, merchantable lumber, at \$4 per thousand; plaintiff to advance the freight from Winlock to Kalama.

Thereafter proceedings were instituted in the Supreme Court of the State of Washington by that state, upon the relation of the plaintiff herein, against the judge of the trial court which authorized the declaration of forfeiture of the contract upon plaintiff's failure to comply with the terms of the order, and also against Gruber, reciting the facts involved therein, and the action of said court in respect thereto, whereupon an alternative writ of prohibition was issued; but, a demurrer thereto having been sustained October 15, 1897, the proceeding was dismissed. Gruber, contending that the forfeiture of the contract by order of the court abrogated the conditional price of \$3.60 per thousand agreed to be paid for the lumber in case the entire quantity was taken, charged the plaintiff for the quantity received the schedule of prices stipulated to be paid therefor in case of the partial performance of the agreement, whereby the quantity so received was valued at the sum of \$1,001.57, instead of \$750.07 at the uniform price, which, with the sum of \$314.91, the expense incurred in dressing and drying the lumber, left of the sum of \$2,500 so paid by plaintiff, a remainder of \$1,183.52 in Gruber's hands at the time of such forfeiture, in consideration of which he, in pursuance of the agreement entered into between plaintiff and defendants, delivered to the latter lumber, charging plaintiff therefor the said schedule of prices, for which they were to pay it only \$3.60 per thousand. The defendants, having secured possession of the mill of which Gruber was the receiver, offered him, December 14, 1897, the sum of \$1,000 for the lumber remaining under plaintiff's contract as originally made, which offer was approved by the court February 18, 1898, but they have never paid any part of that sum therefor. The court on February 23, 1898, made an order slightly modifying the preceding order, from which the following excerpt is taken: "Nothing in this order, nor in the order of February 18, 1898, is to be construed as a final adjudication

of the amount of lumber delivered or to be delivered to the said Pacific Export Lumber Company by said receiver under the terms of their contract." The defendants, in answer to plaintiff's request for a statement of the quantity of lumber they had received from Gruber under their agreement entered into with plaintiff for the purchase thereof, wrote it as follows:

"WINLOCK, Washington, November 4, 1897.

"*Pacific Export Lumber Company, Portland, Oregon—*

"Gentlemen: We can only give you the approximate amount of lumber we have used of your stock at present, but will have the correct tally in a few days. Up to October 19 we have used about 181,000 feet, and 80,000 more up to the twenty-fifth of October. The lumber was taken in small lots, and tally is quite lengthy, but will have a copy for you in a short time.

"Yours truly,

PRESCOTT, VENESS & COMPANY."

1. A receiver is an agent appointed by a court to execute its orders in the control and management of business pertaining to property in possession of the court, and the agent has no power to make any contract that can affect such property unless it is ratified by the court appointing him: *Thompson v. Holladay*, 15 Or. 34 (14 Pac. 725). "If the contract," say Gluck & Becker in their work on Receivers of Corporations (§ 38), "be made by the receiver pursuant to the direction or authority given by the court, it then has the character of a judicial one; and the party making it subjects himself to the jurisdiction of the court, and may be required to complete it." Mr. Justice BREWER, in *Kneeland v. American L. & T. Co.* 136 U. S. 90 (10 Sup. Ct. 952), speaking upon this subject, says: "A party bidding at a foreclosure sale makes himself thereby a party to the proceedings, and subject to the jurisdiction of the court for all orders necessary to compel the perfecting of his purchase, and with a right to be heard on all questions thereafter arising affecting his bid which are not foreclosed by the terms of the decree of sale, or are expressly reserved to him by such decree." "Since a receiver," says

Mr. High, in his work on Receivers (§ 186), "is an officer of the court, and all contracts made with him are subject to ratification by the court, it has undoubted power to vacate or modify any agreement or contract which the receiver has made, and to direct the making of another agreement; but it will not exercise such power without notice, and without hearing the contracting parties."

2. Jones, with Gruber's consent, assigned his interest in the original contract to plaintiff, which agreed faithfully to keep and perform the terms and conditions thereof; and the assignment, having been ratified by the court, made the plaintiff a party to the contract, thereby submitting itself to the jurisdiction of the court, which, upon notice, could vacate the contract if the plaintiff refused to perform its part thereof.

3. The pleadings set out and admit the proceedings of the superior court for Lewis County, Washington, from which it appears that a citation was issued, requiring the plaintiff to appear and show why the contract should not be declared forfeited for its failure to pay the installment of \$500 maturing May 1, 1897, and that in pursuance of such notice plaintiff's attorney filed an answer controverting the material averments of Gruber's petition, and showing why his client should be relieved from such payment. The authority of plaintiff's attorney to appear for it is not questioned, and, the court in which the proceedings were instituted being a tribunal of general and superior jurisdiction, the judgment rendered therein, declaring a forfeiture of the contract, is not void; and, the fact of a judicial record of a sister state being the same in this state as in the state where it was made (Hill's Ann. Laws § 738), such judgment is binding upon the plaintiff. We do not understand that this action is intended as a collateral attack upon the judgment declaring the contract forfeited, but that plaintiff's counsel, admitting that such judgment put an end to the agreement, contend that by the express stipulation of the parties the title to the lumber vested in the plaintiff as it paid therefor at the rate of \$3.60 per thousand, and that.

the quantity to which it was entitled not having been determined by the court in Washington, no error was committed in rendering the judgment complained of. If it be conceded that, upon a purchase of a part without segregation thereof, any title thereto could vest in a purchaser of such part upon the theory that as the payments were made the purchaser acquired an equitable interest in the whole, which, being separated into two or more parts, could result in vesting a legal title to one of them, does the contract warrant the construction insisted upon? It will be remembered that, while Gruber only agreed to sell the lumber to Jones, he stipulated in the assignment of the latter's interest to plaintiff "that the lumber agreed to be sold under the said contract shall become the property of, and the title thereto shall be completely invested in, said Pacific Export Lumber Company, as the same shall be paid for according to the terms of said contract;" the plaintiff agreeing faithfully to keep and perform each of Jones' covenants "in precise manner and form as in said contract provided." Reading the terms of Jones' contract into plaintiff's agreement for the purpose of determining its rights thereunder, it would appear therefrom that instead of a mere agreement to sell lumber, as evidenced by the original contract, plaintiff secured by the assignment an enlarged right, viz., an absolute sale of a given quantity thereof as each payment was made; assuming, without deciding, that a sale could be effected without a segregation. Jones having agreed, however, to purchase all the lumber at a uniform price, it is quite evident from the terms of his contract that if he had performed only a part of his agreement he would have been obliged to pay the market price according to the schedule adopted; for he could only secure lumber at \$3.60 per thousand when he took the entire quantity. The plaintiff stipulated that it would keep and perform Jones' agreement "in precise manner and form as in said contract provided," and, while its title may have vested as the payments were made, it could only attach to such a quantity as could be secured by the payment of the market prices, based upon the quality re-

ceived, and not upon the stipulated price, which was applicable only in case it took the entire quantity.

4. It is contended by plaintiff's counsel that Gruber on June 30, 1897, and prior to the expiration of the ten days allowed to pay the installment of \$500, having been requested to ship to it the merchantable lumber remaining, which was the poorest quality under the terms of the contract, and the receiver having refused to comply therewith, he, and not the plaintiff, violated the terms of the agreement, and hence no error was committed in rendering the judgment complained of. This contention is without merit; for, if the plaintiff could claim by right any lumber at the uniform price after its default, it was as much entitled to the best quality as to the inferior grade, and, this being so, lumber could have been secured at \$3.60 per thousand, to the extent of the payment of \$2,500 so made, notwithstanding the default. It was stipulated in the contract entered into between plaintiff and Gruber that any failure to keep or perform the terms of the agreement should render it null and void. The plaintiff neglected to make the payment maturing May 1, 1897, and, when cited to appear, the court did not order the contract to be canceled until ten days after June 23 of that year. This grace, however, was granted to permit the plaintiff to make the payment, and not to secure the lumber at the uniform price of \$3.60 per thousand. The defendants' letter of November 4, 1897, shows that they had received from plaintiff's stock of lumber 261,000 feet, while their answer denies that they received from Gruber on its account more than 179,527 feet. We do not think this is an admission of plaintiff's title to the entire quantity so taken, so as to create an estoppel against the defendants; for in Jones' contract the lumber agreed to be sold was denominated "yard stock," and the defendants evidently intended, by referring to the lumber received as "your stock," to identify it as the lumber originally agreed to be sold.

We think the court erred in refusing to grant the nonsuit, and hence the judgment is reversed, and the cause remanded

for such further proceedings as may be necessary, not inconsistent with this opinion. **REVERSED.**

Decided 27 January, 1902.

ON MOTION TO MODIFY JUDGMENT.

MR. JUSTICE MOORE delivered the opinion.

5. The judgment in this cause having been reversed on appeal, plaintiff's counsel filed an application in the nature of a petition for a rehearing and a remandment for a new trial, from which it appears that under the terms of the contract, as construed by this court, the defendants have not paid the entire purchase price of the lumber received on plaintiff's account. The trial having been had without the intervention of a jury, if the conclusions of law found by the court were not deducible from its findings of fact the cause might have been remanded, with directions to render a particular judgment: *Merchants' Nat. Bank v. Pope*, 19 Or. 35 (26 Pac. 622); *Coulter v. Portland Trust Co.* 20 Or. 469 (26 Pac. 565, 27 Pac. 266); *Nodine v. Shirley*, 24 Or. 250 (33 Pac. 379); *Grant v. Paddock*, 30 Or. 312 (47 Pac. 712); *Cochran v. Baker*, 34 Or. 555 (52 Pac. 520). But where the trial court makes no findings of fact in a cause tried before it without a jury, this court is powerless to supply the omission, and must remand the cause for a new trial: *Liebe v. Nicolai*, 30 Or. 364 (48 Pac. 172). No findings of fact in respect to the sum remaining due the plaintiff under the terms of the contract, as construed by this court, having been made, the cause will be remanded for a new trial. **REVERSED.**

Argued 16 December, 1901; decided 20 January, 1902.

WAGNER v. PORTLAND.

[60 Pac. 985, 67 Pac. 300.]

RULES OF COURT—AMENDING ABSTRACT.

1. Where a rule of court has become uncertain in meaning by the enactment of statutes since its announcement, parties who have attempted in good faith to comply with the rule should be allowed to amend their papers so as to prevent injustice or hardship.

RULES—EXCUSING DEFAULT IN FILING BRIEFS.

2. Sickness of counsel is a sufficient excuse for a short delay in filing a brief, under Rule 6 of this court, the delay not affecting the jurisdiction.

MUNICIPALITY—AGENCY OF BOARD OF FIRE COMMISSIONERS.

3. A board of fire commissioners appointed under a city charter authorizing the mayor to appoint a board of fire commissioners, which board shall have exclusive power and authority to organize and control the fire department, is not an independent body, but its acts are those of the city, for which the latter is liable.

LIABILITY OF CITY FOR NEGLIGENCE OF ITS AGENTS.

4. A city engaged in the legal duty of repairing its fire alarm system through private and corporate agencies is acting in its corporate capacity and in the performance of ministerial acts, and is liable for injuries received by a workman therein.

ACTIONS AGAINST PUBLIC CORPORATIONS.

5. Hill's Ann. Laws, § 350, providing that an action may be maintained against any public corporation in this state, in its corporate character, and within the scope of its authority, for an injury to plaintiff from some act or omission of such public corporation, authorizes an action against a city only when it is liable in its corporate capacity, as distinguished from its political or governmental capacity.

FELLOW SERVANTS—NEGLIGENCE OF EMPLOYER.

6. Workmen jointly engaged with plaintiff in removing an electric wire, who were not under any special directions, but were using their judgment as to the manner of the work, are fellow servants with plaintiff; and a recovery cannot be had from the common employer for injuries received, unless it was derelict in its duty, in not taking proper precautionary measures for the safety of employees, whereby the injury ensued without the concurrence of plaintiff's acts, or those of fellow servants.

MASTER AND SERVANT—PROVIDING RULES—QUESTION FOR JURY.

7. In an action by a workman against his employer for damages from an injury claimed to have been caused by the negligence of the latter, the question whether defendant was negligent in omitting to adopt suitable rules is for the court, in the absence of any evidence showing the necessity and practicability of such rules.

QUALIFICATION OF WITNESS ON EXPERT SUBJECT.

8. Before a witness should be permitted to testify on a matter requiring expert knowledge he should be shown to be skilled touching the subject of inquiry.

40	389
40	442
40	389
42	541

40	389
48	38

EVIDENCE—SHOWING NECESSITY FOR RULES BY EMPLOYER.

9. Questions asked a witness who was not shown to be an expert as to the necessity of rules for taking down electric wires, and questions regarding the adoption of rules by other companies doing that class of work, but which were not confined to the specific rules which plaintiff insisted should have been adopted, which questions were objected to by defendant, did not constitute such an effort to show the necessity of such rules as to preclude defendant from insisting on a lack of evidence in this particular.

NECESSITY FOR RULES—ELECTRIC WIRES.

10. When several fellow servants are taking down electric wires, and not acting under any regulations, the cutting of a wire at the proper place for the convenience of the work and to insure the safety of the employees, is a detail of the work, which was for the judgment and control of the workman themselves, and not for the master to regulate by the adoption of rules for their guidance.

MASTER AND SERVANT—ASSUMING RISK OF EMPLOYMENT.

11. A workman who has worked for two months and a half in taking down electric wires without using rubber gloves, or boards to stand on, knowing the hazards attending the work, will be deemed to have assumed the risk of performing this work without such appliances.

HAZARD OF EMPLOYMENT—KNOWLEDGE OF EMPLOYEE.

12. A man of mature years, not laboring under any mental disability, engaged in taking down fire alarm wires, who had been warned by a fellow servant of the danger of being killed while working in proximity to an electric company's wires, and who had heard two fellow servants say they had received shocks, and had witnessed the effect of electricity on a horse, will not be deemed ignorant of the danger of electricity, and of the hazards of the employment.

From Multnomah: ALFRED F. SEARS, JR., Judge.

Action by Henry M. Wagner against the City of Portland. From a judgment in favor of the plaintiff, the defendant appeals. A motion to dismiss the appeal was overruled, and the case was heard on its merits. **REVERSED.**

Decided 5 May, 1900.

ON MOTION TO DISMISS APPEAL.

Mr. Thos. O'Day, for the motion.

Mr. Joel M. Long, contra.

PER CURIAM. This is a motion to dismiss the appeal herein for two reasons: First, the abstract of record contains no assignment of errors relied upon for a reversal of the case;

and, second, appellant has not filed its brief within the time required by the rules of this court.

1. The procedure on appeal has been materially amended by the late act of the legislative assembly: Laws, 1899, p. 227. A party may now appeal by giving notice in open court, or before the judge thereof at chambers, at the time of the rendition of the order, judgment, or decree, that he appeals therefrom, or from some specified part thereof; or, if not taken at the time, he may appeal by causing a notice signed by himself or attorney to be served on the adverse party or parties that have appeared in the action, and such notice shall be sufficient if it contains the title of the cause, the names of the parties, and notifies the adverse party, or his attorney, that an appeal is taken to the higher court (designating it) from the judgment, order, or decree, or some specified part thereof. It will be observed that it is not necessary to specify or assign errors in the notice of appeal, as was formerly the case. The rules of the court were adopted in view of the old law, and hence, under rule 9 (24 Or. 599, 37 Pac. vii.), it is prescribed that, if the appeal is from a judgment in an action, the appellant shall set out in his abstract of record those assignments of error in the notice of appeal on which he intends to rely, and none other. As the law now requires no assignments of error in the notice of appeal, it is urged that under rule 9 no statement of errors in the abstract is necessary, and that rule 10 (37 Pac. viii.), providing that where an abstract has been served no question appearing upon the record will be examined or considered on the hearing in this court except such as may arise upon the assignments of error contained in the printed abstract, is thereby rendered nugatory, in so far as it may pertain to actions at law. There is much force in the contention, for, under the present law, at least, it is not clear what assignments of error in law cases must be set out in the abstract. The appellant should, therefore, in the interest of justice, have the benefit of the doubt, and be allowed to amend its abstract by serving and filing assignments of error within ten days. This is the first time that our attention

has been called to the want of clearness in the rules in this regard since the amendatory act of 1899, and the necessary amendments are now being considered, and will be promulgated at an early day.

2. As it pertains to the second reason for dismissal, it appears that appellant's brief was filed a few days after the expiration of an extended time for filing same. In this appellant is in default, but it is not vital to the jurisdiction of the court. The delay was caused by sickness of counsel, and appellant will be relieved of the default, and the brief allowed to stand as filed. The motion will therefore be overruled.

MOTION OVERRULED.

Decided 20 January, 1902.

ON THE MERITS.

For appellant there was a brief over the names of *Joel M. Long*, city attorney, and *Ralph R. Duniway*, with an oral argument by *Mr. Long*.

For respondent there was a brief over the name of *O'Day & Tarpley*, with an oral argument by *Mr. Thos. O'Day*.

MR. JUSTICE WOLVERTON delivered the opinion.

A board consisting of three commissioners appointed by the mayor is given by the charter of the City of Portland full, complete, and exclusive power and authority on behalf of the city to perform all executive functions thereof in the organization, management, and control of its fire department, and all powers and duties incident thereto: Laws 1898, p. 132, § 87. In pursuance of this authority, such board had under its control and management a system of fire alarm wires; being the property of the city, and used for communicating alarms of fire occurring therein. R. G. Paddock, who was the city electrician, and superintendent of the system, deriving his authority from the board, employed the plaintiff as groundman. While engaged in that capacity, keeping the system in repair,

he was injured by receiving a shock from an electrical current, for which injury he brings this action for damages, alleging that it was caused by the negligence of the municipality; and, having obtained a judgment in the trial court, the defendant appeals.

By defendant's separate defense, which was stricken out on motion, two questions are presented, which lie at the threshold of the controversy. It is maintained with much emphasis (1) that the board of fire commissioners is an independent body, so constituted by the charter, with full and exclusive power and control over the fire department, and the city is in no sense responsible for its acts; and (2) that the board, in prosecuting such improvement, acted in a political and governmental, rather than in a private or corporate, capacity, and therefore it cannot be held amenable for the negligence of its officers and agents. The two positions are not altogether consistent, as the latter seems to assume that the fire department is not an independent body, such as to shift liability from the city. But the purpose is manifest to save both questions, and, if the former is decided adversely to the contention, then the latter becomes a live issue.

3. We think that the charter settles the former. It vests in the board the executive functions of the city pertaining to the organization, management, and control of the fire department, and all powers and duties incident thereto. As to this particular department, therefore, the board stands in the place and stead of the common council, exercising the authority of that body; and its acts become as much the acts of the city as if the common council had performed them, had not the authority in the premises been transferred to the board.

4. As to the latter question, it is one of more difficulty,—not so much in the finding of general rules governing the liability of municipal corporations for torts committed through their officers and agents, but in determining where the case falls, and by what rules it is governed. Municipal corporations exist in a dual capacity, and their functions are twofold. In one, they exercise the right springing from sovereignty, and

while in the performance of the duties pertaining thereto their acts are political and governmental. Their officers and agents, though elected or appointed and paid by them, are nevertheless public functionaries, performing a public service, in which the corporations, as such, have no particular interest, and from which they derive no special benefit or advantage in their private or corporate capacity. Such officials are not, strictly speaking, the servants and agents of the municipalities through which they derive their authority, but are officers, agents, and servants of the state (that is, the political divisions thereof, or the public at large), and for their acts of omission and commission the municipalities themselves are not liable. In the other, they exercise a private, proprietary, or corporate right, arising from their existence as legal persons; and where the duty is one that rests upon the municipalities in respect of their special or local interests, and not as public agencies, and is absolute and perfect, not discretionary or judicial in its nature, their officers and agents in the performance of the function or duty act in behalf of, or as the *alter ego* of, the municipalities in their corporate capacity, and not for the state or public at large, and for their acts the municipalities are held to accountability. This has become the settled doctrine in the jurisprudence of this country, about which there is no dissent: *Caspary v. City of Portland*, 19 Or. 496 (24 Pac. 1036, 20 Am. St. Rep. 842); *Esberg Cigar Co. v. Portland*, 34 Or. 282 (55 Pac. 961, 43 L. R. A. 435, 5 Am. Neg. Rep. 292, 75 Am. St. Rep. 651), and cases there cited; 1 Jaggard, Torts, 173, 179; Mechem, Pub. Off. §§ 850, 853; 2 Dillon, Mun. Corp. (3 ed.) § 980. Touching the liability of municipalities in their corporate capacity, the rule is succinctly stated in *Wright v. City Council of Augusta*, 73 Ga. 241 (6 Am. St. Rep. 256), as follows: "Whenever the negligence or nonfeasance of the ordinary agents and servants of the corporation, as distinguished from that of its officers, causes the injury, or when the loss results from acts merely ministerial, as distinguished from such as are legislative and governmental in character, exercised for the sole and immedi-

ate benefit of the public, or where the corporation is exercising, as a corporation, its private franchise, powers, and privileges, which belong to it for its immediate corporate benefit, or is dealing with property held by it for its corporate advantage, gain, or emolument, though inuring ultimately to the benefit of the general public, then, and only then, it becomes liable for the negligent exercise of such powers, precisely as are individuals.”

Undeniably, municipalities, when acting through their fire departments in the preservation of property from the devastation of fire, are in the exercise of a purely governmental function, and their officers and agents represent the public, as an arm of the state, for whose acts the corporations are not liable. It was so held in *Hafford v. City of New Bedford*, 16 Gray, 297, where certain of the firemen negligently ran a hose carriage against the plaintiff and injured him. So, in *Fisher v. City of Boston*, 104 Mass. 87 (6 Am. Rep. 196), where the hose provided by the city, and in use through the fire department, burst, causing the injury complained of. In this case Mr. Justice GRAY, now of the Supreme Court of the United States, says: “But the extinguishment of fires is not for the immediate advantage of the town in its corporate capacity; nor is any part of the expense thereof authorized to be assessed upon owners of buildings, or any other special class of persons whose property is peculiarly benefited or protected thereby. In the absence of express statute, therefore, municipal corporations are no more liable to actions for injuries occasioned by reason of negligence in using or keeping in repair the fire engines owned by them, than in the case of a town house or a public way. * * * It makes no difference whether the legislature itself prescribes the duties of the officers charged with the repair and management of fire engines, or delegates to the city or town the definition of those duties by ordinance or by-law. However appointed or elected, such persons are public officers, who perform duties imposed by law for the benefit of all the citizens, the performance of which the city or town has no control over, and derives no benefit

from, in its corporate capacity. The acts of such public officers are their own official acts, and not the acts of the municipal corporation or its agents." And in *Mendel v. City of Wheeling*, 28 W. Va. 233 (57 Am. Rep. 665), where the city authorities allowed pipes laid to plaintiff's premises for conducting water thereto, to be used for fire and other purposes, to fill up so as not to be serviceable in the extinguishment of a fire, to his damage, the same doctrine was upheld. So, also, in *Welsh v. Village of Rutland*, 56 Vt. 228 (48 Am. Rep. 762), where the engineer of the fire department, under the direction of the village trustees, in thawing out a hydrant connected with an aqueduct flooded the street with water, which becoming frozen, the plaintiff was injured by falling thereon. And in *Wilcox v. City of Chicago*, 107 Ill. 334 (47 Am. Rep. 434), where the plaintiff sustained injury by the collision of a hook and ladder wagon with his carriage; also in *Edgerly v. Concord*, 62 N. H. 8 (13 Am. St. Rep. 533), where the injury occurred through fright of the plaintiff's horse, caused by a stream of water thrown from a hydrant by the officers of the fire department, at the request of the mayor of the city, for the purpose of testing the capacity of the hydrant; and, again, in *Kies v. City of Erie*, 135 Pa. 144 (19 Atl. 942, 20 Am. St. Rep. 867), where the door of an engine house was so negligently operated that, when being opened upon the sidewalk, it struck a pedestrian and injured him. Many other cases might be cited, but these are sufficient to illustrate the doctrine. The nonliability of the municipality is based upon the idea that it is acting in a public or governmental capacity, as an arm of the state, and hence the doctrine of *respondeat superior* is without application.

But the case at bar is distinguishable from any of these cases, or any that we have been able to find applying the doctrine referred to therein. Here the city was acting in the discharge of a legal duty to repair the fire alarm system, and the case is one of common employment for the performance of a special service for and in behalf of the city. The duty was being performed through the instrumentality of private or

corporate agencies, and not through the fire department or its officers, or through officers of the city whose duty it was to perform such work; and it might be added that the work of repairing was an act ministerial in its nature. In a similar case [*Mulcairns v. City of Janesville*, 67 Wis. 24 (29 N. W. 565)], where the city was engaged in the construction of a cistern for the use of the fire department, and an employe was injured through the negligence of other employes, it was held that the city was liable, under the doctrine of *respondeat superior*; so, in *McCaughey v. Tripp*, 12 R. I. 449, where an employe was injured while the City of Providence was engaged in the construction of a city hall. See, also, *Donahoe v. City of Kansas City*, 136 Mo. 657 (38 S. W. 571); *City of Toledo v. Cone*, 41 Ohio St. 149. From these latter authorities we are impelled to the conclusion that corporate liability exists in the case at bar, and that the further and separate defense of non-liability was therefore properly stricken out.

5. Plaintiff's counsel contend that the statute settled the question at the very outset. But it only gives the action against the municipality when it is liable in its corporate capacity, as distinguished from its political or governmental capacity, as an arm of the state in the exercise of sovereignty: Hill's Ann. Laws, §§ 349, 350. So the question recurs, in what capacity was the city acting when the injury was sustained?

6. At the close of the testimony the defendant moved for a nonsuit, but without success, and error is predicated upon the action of the court in that regard. This necessitates a consideration of the testimony adduced, with a view to ascertaining whether the plaintiff proved a cause sufficient to be submitted to the jury. The basis of the action is the negligence of the city, its officers and agents, contributing as a proximate cause to the injury sustained by the plaintiff; and unless acts are shown from which negligence may be reasonably inferred in some particular, and attributable to the city in its corporate capacity, the case is not such a one as should be submitted for the jury's consideration. The Portland General Electric

Light Company was operating a system of electric light wires, extending north and south on the east side of Sixth Street where it intersects Yamhill, among which are what are known as "primary wires," carrying from ten hundred to twelve hundred volts of electricity, one of its poles standing immediately within the curbing at the southeast corner of Sixth and Yamhill Streets, and another south of that, about two-thirds of the distance across the block, near Mr. Corbett's barn. The Oregon Telephone Company had a system of wires on the west side of Sixth Street, one of the poles standing a little south of the southwest corner of Sixth and Yamhill; and the Columbia Telephone Company had a system extending east and west on the south side of Yamhill Street. The city had its fire alarm wires attached to the Columbia Telephone Company's poles, extending west on Yamhill Street to Sixth, at which point and from there south it was attached to the electric company's poles. Immediately prior to the time of the accident the superintendent directed that the city's wires should be changed in some particulars so as to avoid contact with some shade trees; and in obedience thereto a new wire had been attached along Yamhill, extending across Sixth Street, and attached to the Oregon Telephone Company's pole, and thence southward back across Sixth Street, and attached to the electric company's pole, near Mr. Corbett's barn, whereupon the old wire was cut near the engine house, or at Fourth and Yamhill, and again at the pole where the new one was attached, and the end thrown over into Sixth Street. Being detached from the electric company's pole at the southeast corner of Sixth and Yamhill, one of the workmen drove a staple into the top of the pole, with a view of keeping it off the electric company's wires while it was being taken down. The plaintiff, acting in his capacity as a groundman, and with a view to reeling it up at the same time, in conjunction with others, attempted to take it down by pulling it through the staple from a point on Sixth Street near the curb on the east side where the end of the wire had fallen when cut. Finding the wire fast, the men with him let go,—one of them to go up

the pole to loosen it, and the others across the street, so as to get a view of the situation; but the plaintiff, continuing in his efforts to dislodge the wire, brought it in contact with one of the electric company's primary wires, resulting in his injury.

The plaintiff's account of the incident is, in substance, that he was at the time, September 28, 1897, and had been since July 13 preceding, in the employ of the city in the capacity of a common laborer to assist in changing the telephone and fire alarm wires; that his particular service was as a ground-man; that he was assigned to the duty of attending the reel and reeling up the wire as it came off the poles, and such other work as was necessary to be done on the ground, digging post holes, helping to set up poles, making connections on the ground, and dropping old wires when the insulation was off; that other men were working with him, namely, Cherry, Fisher, Schad, Baker, and Severian, the latter being the foreman of the gang; that after the wire had been cut he took his reel from the southwest corner of Sixth and Yamhill streets, where it then was, to where the end of the wire lay; that he, Baker, Cherry and Schad pulled on the wire until they found it was fast; that some one suggested that Cherry go up the pole, which he did, and Baker and Schad crossed over to the corner on the other side of Sixth Street, and that the witness, continuing in the effort to dislodge the wire, received a shock; that the wire was above the electric company's wires, and from where he was he could not see the point of contact with them, because of a tree which obscured his vision; that he did not understand, nor was he experienced as to the nature of, electricity; that he was perfectly ignorant of the danger of it; that neither the city nor its officers had ever given him any advice or instruction touching the danger of his employment, except on one occasion, some four or five weeks previous, when he was warned while adjusting a heavily insulated wire that he had better stand on some boards, as he was liable to get killed; that he had no previous warning by the city or its officers of the existence of the primary wires of the electric company, or that they were charged with electricity; that the

city had no rules for the government of laborers in performing their work, and did not furnish boards for them to stand on, or rubber gloves for them to use. On cross-examination he testified that the wire was a very old one, the insulation being off in places, and that he might have taken hold of it where the insulation was off, and that he had assisted in taking down a good many miles of wire.

H. H. Cherry testified that the electric company's wires were insulated primary wires, heavily charged, and used for distributing electricity about the city; that the plaintiff, Schad, Baker, and himself started to pull the wire down, when it caught somewhere on the pole; that he went up to take it loose, and the plaintiff was shocked; that he heard him make a noise, and saw the wire rocking,—saw it come in contact with the electric company's primary wire,—whereupon he took hold of it and lifted it clear; and that there was a bare connection with the primary wire. On cross-examination he stated that he did not recollect whether he cut the wire on Sixth Street, near Corbett's barn, or not, or whether Cullins, one of the men working in the gang, cut it, but whoever it was threw it over into the street; that the men, as a crew, had been taking down wires for about two months, and that plaintiff had been with them during the time; that it was his custom when he went up to unfasten these wires to look and see if they were going to come in contact with primary wires; that a man would recognize such things; that he knew there was a primary wire there when he unfastened the wire in question and took it off the insulator; that he put a staple in the top of the pole somewhere, and the wire came through, and the men pulled against it; that they could just as well have cut the wire at the pole as not; that the men used their own judgment as to where they should cut the wires; that they were supposed to work under Mr. Severian's orders, and that, if he told them to cut the wires in a certain place, it was done; that Severian was working with the men under Mr. Paddock, the electrician; that Paddock gave the general orders, and the men, under Severian's orders, would execute them; that at

the time he fastened the staple he thought it was the best way to keep this wire off the primary wire of the electric company, but it did not suffice for the purpose; that all he had to do when he went up the pole the second time was to lift the wire off the primary wire; that, to the best of his recollection, the covering of the wire was carried up in a bunch at the staple, and that when this was taken out and cut off the wire was pulled down over the primary wire; that the staples used were big, strong staples; and that he used the one on that occasion according to his best judgment to keep the wire from coming in contact with the primary wire.

R. G. Paddock testified that he was superintendent of the fire alarm and police signal wires in the city; that he hired all the men, subject to the action of the board of fire and police commissioners; that he was given authority by these boards to hire such men as necessity required; that no rules had been promulgated requiring the wires to be cut where crossing primary wires, or the electric company to turn off its electricity, nor were there any boards or rubber gloves furnished for the use of the men; that rubber gloves, being nonconductors, were designed to protect the men from receiving a shock from a heavily charged wire, or one carrying a great voltage; that under certain circumstances boards are nonconductors; that all these things are relative, depending upon the voltage; that a dry board is a nonconductor; that if a person is standing on a dry board, and the voltage is comparatively low, the board will act as an insulator, the same as glass, and that one thousand volts is comparatively low, nowadays,—speaking generally, a dry board, or a piece of dry carpet, or a piece of paper or glass, are all considered nonconductors (in other words, they are very poor conductors of electricity); that none of them are strictly nonconductors, but are relatively high in resistibility, and that if a person would get on some dry boards or a piece of paper, or a piece of dry rubber, or anything like that, he could handle a thousand volts without danger; that the matter of putting up and taking down these wires was largely a matter of detail with the workmen

themselves; in some specific cases, Severian or witness would give special instructions, but, as a general proposition, the cutting or handling of the wires was a matter of detail with the crew. Other witnesses were called, but this is the practical effect of the testimony, and there is nothing to dispute it. It is at once apparent from this testimony that the acts immediately contributing to the injury of the plaintiff were the acts of Cherry or Cullins in cutting the wire at the pole near Corbett's barn, and casting it into the street across the primary wires of the electric company, and the act of Cherry in securing it to the top of the pole in such a manner as to allow it to come in contact with such primary wires. Further than this the act of the plaintiff and the workmen with him in attempting to pull the wire through the staple from the position where the end of it fell, instead of taking it across the street opposite the pole where it was fastened, may have been a contributing factor. Cherry says he used his best judgment in attaching the staple so as to have the wire come off clear of the primary wires, but failed in his purpose, possibly because of the position of the plaintiff in doing his work.

But, waiving this feature of plaintiff's position, it is clear that the person who cut the wire and threw it into the street across the wires of the electric company, and Cherry, who endeavored to make it fast to the top of the pole to which the primary wires were attached, so as to avoid contact with them, were fellow servants with the plaintiff, and he is precluded from recovery on that account, unless the city has been derelict in its duty, by not taking proper precautionary measures looking to the safety of its employes, whereby the plaintiff's injury ensued, without the concurrence of his own acts or those of his fellow servants contributing thereto. As to who are fellow servants and who is the master, has been substantially settled by this court in *Mast v. Kern*, 34 Or. 247 (5 Am. Neg. Rep. 88, 266, 54 Pac. 950, 75 Am. St. Rep. 580),* wherein it was said

*NOTE.—See with this case a monographic note, Who is a Vice Principal.

See, also, 50 L. R. A. 417, for a long note, What Servants are Deemed to be in the Same Common Employment, Apart from Statutes, Where There are no Questions as to Vice Principalship.

(MR. JUSTICE BEAN announcing the opinion of the court):
“The true test in all cases by which it may be determined whether the negligent act causing the injury is chargeable to the master, or is the act of a coservant, is, was the offending employe in the performance of the master’s duty, or charged therewith, in reference to the particular act causing the injury? If he was, his negligence is that of the master, and the liability follows. If not, he was a mere coservant, engaged in a common employment with the injured servant, without reference to his grade or rank, or his right to employ or discharge men, or to his control over them. In short, the master is liable for the negligence of an employe who represents him in the discharge of his personal duties towards his servants. Beyond this he is liable only for his own personal negligence.” Paddock was the city electrician and the superintendent of the alarm system. He directed the work to be done, and the men under the immediate direction of Severian, as his assistant, were engaged in the service. The linemen used their judgment as to the matter of detaching and taking the wires down, and it was not the master’s duty to give specific directions touching the details of the work. Whoever attended to that while engaged in the particular capacity was a fellow servant with the plaintiff, and not a master or vice principal. It is the duty of the master, however, to adopt needful and reasonable rules and regulations for the government and protection of his agents and servants while pursuing their employment; to exercise suitable care and precaution to provide them with a reasonably safe place in which to work, and fit and safe tools and appliances to work with, and to employ suitable and competent fellow servants; and such duty cannot be delegated in any manner so as to shield him from responsibility. Whoever performs this duty performs the master’s duty, and, if he is not the master himself, he becomes a vice principal, and the master is still responsible.

7. Now, plaintiff insists that it was the duty of the city to have adopted rules and regulations which, among other things, should have required the wires that were being detached and

removed from the poles to be cut wherever they crossed a primary wire, or the electricity to be turned off the primary wires while the employes were at work in proximity thereto. It may be predicated of the employment in which the plaintiff was engaged that it was dangerous and hazardous, as it is common knowledge that electricity is a dangerous element, and those engaged in and about the instrumentalities and appliances by which it is handled and utilized in any considerable voltage are liable to come in contact with it and be injured. As a general rule, the dangers connected with such a business, that are unavoidable after the exercise by the master of proper care and precaution in guarding against them, are risks incident to the employment, and are assumed by those who consent to accept employment under the circumstances. Such dangers, however, as are known and can be mitigated or avoided by the exercise of reasonable care and precaution by those engaged in the business are not perils which the employe must encounter as incident to the business, and the master is generally held to accountability for his neglect in this regard contributing to the injury of the servant. "In other words," says Mr. Chief Justice RUGER in *McGovern v. Central St. R. Co.* 123 N. Y. 280 (25 N. E. 373), "it is the duty of the master, having control of the times, places, and conditions under which the servant is required to labor, to guard him against probable danger in all cases in which that may be done by the exercise of reasonable caution." See, also, *Anderson v. Inland Teleph. & Tel Co.*, 19 Wash. 575 (53 Pac. 657, 41 L. R. A. 410).

In this connection it should be observed that, although this duty is imposed upon the master, his neglect of it will not always render him liable as against a servant who engages in the employment with full and explicit knowledge of the master's default. The rule is stated thus by Mr. Justice DEVENS in *Leary v. Boston & Alb. R. Co.* 139 Mass. 580, 584 (2 N. E. 115, 52 Am. Rep. 733): "The servant assumes the dangers of the employment to which he voluntarily and intelligently consents, and while ordinarily he is to be subjected

only to the hazards necessarily incident to his employment, if he knows that proper precautions have been neglected, and still knowingly consents to incur the risk to which he will be exposed thereby, his assent dispenses with the duty of the master to take such precautions.' It is probably best grounded upon the idea that where two negligent acts conduce to an injury, responsibility attaches to the one that stands as the proximate or immediate cause; and in such a case the servant cannot hold the master responsible, although culpable, because his own negligence is the direct and immediate cause of his injury. *Stager v. Troy Laundry Co.* 38 Or. 480, 486 (63 Pac. 645, 53 L. R. A. 459); *Fitzgerald v. Connecticut River Paper Co.* 155 Mass. 155 (29 N. E. 464, 31 Am. St. Rep. 537). The question whether the defendant was at fault in omitting to adopt suitable rules is not one for the jury, unless there is something in the testimony from which the inference may be drawn that it was practicable to have provided against the occurrence of the accident complained of by such a rule. The court say in *Texas & N. O. Ry. Co. v. Echols*, 87 Tex. 339, 343 (27 S. W. 60, 28 S. W. 517): "Whether or not the evidence is sufficient to show a case in which the duty to make rules rested upon the defendant is a question of law for the court. If the facts raised that issue, it should have been submitted to the jury; otherwise it should not." It may occur that the necessity and propriety of making and promulgating rules in a given case are so obvious as to make the matter one of common experience and knowledge. Such a condition would warrant a submission of the question as to whether the defendant was at fault in omitting its duty in this regard to the jury without evidence. But that is not the case here. It is manifestly not a matter of common knowledge and experience that rules such as plaintiff suggests would be practicable, or even useful, in the prevention of an accident of the kind. If, notwithstanding they were in fact necessary and practicable, it was a matter susceptible of proof, by showing that other municipalities, companies, or persons engaged in handling electrical machinery and appliances for generating and util-

izing electrical currents had adopted and put into operation such rules, with serviceable results, or by the testimony of persons possessing peculiar skill and experience in the construction, repair, management, and operation of such machinery and appliances. No such proof is to be found in the record, and hence a case has not been made in this particular upon which to put the question of negligence of the defendant in omitting the adoption and promulgation of the rules insisted upon to the jury: *Berrigan v. New York, L. E. & W. R. Co.* 131 N. Y. 582 (30 N. E. 57); *Morgan v. Hudson River Iron Co.* 133 N. Y. 666 (31 N. E. 234); *Atchison, T. & S. R. Co. v. Carruthers*, 56 Kan. 309 (43 Pac. 230); *Whalen v. Michigan Cent. R. Co.* 114 Mich. 512 (72 N. W. 323).

8. Plaintiff did attempt, however, to establish the practicability and necessity therefor, but says he was not permitted to do so because of the objection of defendant's counsel, and he insists that defendant cannot now complain of error which it invited. The rule sought to be invoked is a wholesome one, authoritatively established: *Elliott*, App. Proc. § 630; *Jobbins v. Gray*, 34 Ill. App. 208, 218; *Insurance Co. of Penn. v. O'Connell*, 34 Ill. App. 357, 360. A witness was asked what he would say as to the necessity of having some rules adopted in regard to performing the work, and this question he was not allowed to answer. It does not appear that he was a person skilled touching the matter of inquiry, so that no error was committed in the ruling upon the objection, and no error could be invited where the objection was well taken.

9. As to the other inquiry, touching the adoption of rules by other companies for the doing of that class of work, the question put and rejected does not reach the point, as it was not confined to the specific rules which plaintiff insists should have been adopted for the prevention of the accident. That other companies had adopted rules generally for the regulation and doing of the class of work being done by the city was too general to be of any practical avail. This constitutes the effort made in that behalf, and we find no error of the court respecting it.

10. Beyond this, however, we are of the opinion that, so far as developed by the evidence in this case, the cutting of wires, and the places where they should be cut so as to take them down conveniently and with the least danger to the workmen, are details of the work, which were for the judgment, discretion, and control of the workmen themselves, and not for the master to regulate by the adoption of rules for their guidance: *Ulrich v. New York Cent. & H. R. R. Co.* 25 App. Div. 465 (51 N. Y. Supp. 5); *Golden v. Sieghardt*, 23 App. Div. 161 (53 N. Y. Supp. 460).

11. With reference to furnishing the workmen with boards and rubber gloves for their use, this may or may not have been the duty of the city. But however that may be, it is a conceded fact that plaintiff worked two months and a half without them, and it is absolutely shown that he still continued in the employment, knowing the hazards attending the work, and he must be deemed, therefore, to have assumed the risk. His negligent act in continuing in the work became the proximate cause of the accident, hence he cannot recover upon that account.

12. Plaintiff says, also, that he was ignorant of the danger of electricity, and was not warned by any officer of the city that the electric company's wires carried electricity in dangerous quantities. But he was a man *sui juris*, of mature years and judgment, not laboring under any mental disability; and his admissions show that he had been previously warned by Cullins, a fellow servant, of the danger of being killed while in the same service in proximity to the electric company's wires where they carried 5,000 volts; that he heard two fellow servants say that they had each received shocks while in the same employment, and witnessed the effect of electricity on a horse, communicated by a sagging wire; and he must necessarily have known, as Cherry, Cullins, and other fellow workmen knew, not only the dangerous character of electricity, but the nature and condition of the electric company's wires. From his testimony there can be but one opinion touching the matter, and that precludes him from gainsaying knowledge

of the danger of electricity, and of the hazards he was incurring while engaged in the service. Under these conditions, there was error in refusing the nonsuit.

Other testimony was offered in the further progress of the trial, but no new features of the case were developed, and nothing shown that would be curative of the matters pertaining to the inquiry. The judgment of the trial court will therefore be reversed, and the cause remanded for such further proceedings as may seem appropriate, not inconsistent with this opinion.

MR. CHIEF JUSTICE BEAN concurs in the result.

REVERSED.

Argued 25 November; decided 30 December, 1901.

JESTER v. LIPMAN.

[67 Pac. 102.]

AMENDING PLEADINGS BEFORE TRIAL—DISCRETION.

1. Where plaintiff alleged that she was called to her employer's office, and accused of stealing articles from its store, and was arrested and confined for several hours, and compelled by threats and intimidation to admit her guilt and pay money, though she was innocent, permitting the plaintiff to strike out the allegation that she had admitted her guilt, after the issues were made up and the case called for trial, was a matter within the discretion of the court, and its ruling will not be disturbed on appeal, unless the discretion is shown to have been abused.

CONSPIRACY—EVIDENCE OF ACTS OF AGENTS AS RES GESTAE.

2. Where evidence has been received tending to support a charge that defendants procured the arrest of plaintiff in pursuance of a conspiracy to extort money from her, the acts and statements of the defendants and of the officers who made the arrest, done and said in the course of the arrest and resulting detention, are competent as part of the *res gestae*.

POSSESSION OF STOLEN PROPERTY—FELONIOUS INTENT.

3. In an action of damages for unlawfully charging plaintiff with larceny and causing her arrest on that charge, an instruction that if a skirt worn by plaintiff at the time of her arrest had been stolen, and had afterwards come into the possession of the plaintiff, and she was informed before being arrested that the skirt had been stolen, and she made no offer to return it, she was guilty of a felony, for which she could lawfully be arrested, was properly refused, as it omitted the element of felonious intent.*

From Multnomah: ALFRED F. SEARS, JR., Judge.

*See *State v. Hill*, 39 Or. 90.—REPORTER.

Action by Amelie Jester against Lipman, Wolfe & Co., Adolph Wolfe, and Isaac N. Lipman. From a judgment for plaintiff, defendants appeal. AFFIRMED.

For appellants there was a brief over the name of *Cotton, Teal & Minor*, and *James Gleason*, with an oral argument by *Mr. Wirt Minor*.

For respondent there was a brief and oral argument by *Mr Henry E. McGinn*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

On March 31, 1899, the plaintiff, who for some time prior to the preceding January had been employed by the defendant corporation, but was not then in its service, was sent for by its managing officers, and upon her arrival at the store was accused of the crime of embezzlement. She persisted in denying the charge, when two police officers were called in, and she was taken to the police station. After being confined there for several hours, she was taken back to the store by the police officers, and, as she testified, compelled by the threats and intimidation of the defendants to deliver to them a gold watch chain, and to promise to pay them \$100 for goods alleged to have been stolen by her from the store, although she was innocent of any crime, and so informed the defendants at the time. The pleadings are substantially the same as in the case of *Bingham v. Lipman*, 40 Or. 363 (67 Pac. 98), except that the complaint alleges that, after plaintiff returned to the store from the police station, she was compelled by threats and intimidation to, and did, "admit the taking of certain articles of personal property from the storehouse of" the defendant corporation, although such admission was untrue. Most of the questions arising here are the same as in the *Bingham Case*, and we shall notice only those not common to the two cases.

1. After the issues had been made up, and when the cause was called for trial, the court allowed the plaintiff, over the objection and exception of the defendants, to strike from her

complaint the allegation that she had admitted her guilt. This was a matter within the sound discretion of the trial court, and its rulings will not be disturbed on appeal, as no abuse of discretion is shown: *Davis v. Hannon*, 30 Or. 192 (46 Pac. 785); *Talbot v. Garretson*, 31 Or. 256 (49 Pac. 978); *Tillamook Dairy Assoc. v. Schermerhorn*, 31 Or. 308 (51 Pac. 438); *Koshland v. Fire Assoc.* 30 Or. 362 (49 Pac. 865); *Farmers' Bank v. Saling*, 33 Or. 394 (54 Pac. 190). The amendment was made before the trial began, and, if prejudicial to the defendants, was at a time when their rights could, and no doubt would, have been fully protected by a continuance or otherwise, if a proper application had been made to the court for that purpose.

2. It is next contended that the court erred in permitting the plaintiff to show that she was arrested and taken to the police station by direction of the defendants, and to state what was said and done by her and others while there. The bill of exceptions does not disclose the nature and character of this testimony, but, assuming that sufficient appears to properly present the question sought to be raised, the testimony was, in our opinion, clearly competent. The police officers, as the plaintiff asserted and gave evidence tending to show, were acting for the defendants in pursuance of their design to wrongfully and unlawfully extort money from her by accusing her of the commission of a crime. What was said and done in furtherance of this unlawful purpose was a part of the *res gestae*, and competent evidence on the trial: *Blount v. State*, 49 Ala. 381; *State v. Grant*, 86 Iowa, 216 (53 N. W. 120).

Two or three days after the plaintiff's arrest, one F. R. Graff, at the solicitation and request of the defendant corporation, called upon her to obtain security for the money which it is alleged she had agreed and promised to pay defendants as compensation for the goods alleged to have been stolen by her. The bill of exceptions reveals that the plaintiff was permitted to give the conversation in evidence, but does not set it out, in substance or otherwise, so that the court is unable to determine whether such permission was error or not.

3. The defendants gave evidence tending to show that, at the time of the interview of Lipman and Wolfe with the plaintiff on the 31st of March, she had in her possession a certain skirt, which had been previously stolen from the defendant corporation, of which fact she was informed at the time, and thereafter requested the court to charge the jury that if they believed the skirt had been stolen and had afterward come into the possession of the plaintiff, and she was informed before the alleged arrest that the property was stolen, and did not return or offer to return it, she was guilty of a felony, for which she could be lawfully arrested. This instruction omits the essential element of every crime; that is, a felonious intent. Although the skirt may have been stolen, the mere fact that the plaintiff did not return or offer to return it after she was so informed would not make her guilty of a crime. To constitute the offense of receiving stolen goods, it must appear that the person so charged knew at the time of receiving them that they had been stolen, and they must have been received feloniously, or with the intent to secrete them from the owner, or in some other way defraud him of them: *Rapalje*, Larceny, § 311; 2 Bishop, Crim. Law, § 1138; *State v. Sweeten*, 75 Mo. App. 127; *State v. Caveness*, 78 N. C. 484. So that, within the statement of the instruction requested, the plaintiff could not have been guilty of the crime of receiving stolen property; and, without a felonious intent, she could not have been guilty of any crime.

The other matters presented in the argument are questions of fact, which were properly submitted to the jury, whose findings are conclusive on this appeal. The judgment is therefore affirmed.

AFFIRMED.

Argued 24 December, 1901; decided 20 January, 1902.

SCHLOSSER v. BEEMER.

[67 Pac. 299.]

40	412
41	381

JUDGMENTS—COLLATERAL ATTACK ON ATTACHMENT RECORD.

1. The judgment of a court of superior jurisdiction against a nonresident, based on a service of summons by publication, cannot be collaterally attacked for irregularities or defects in the attachment proceedings connected therewith, where such proceedings are not by statute made jurisdictional, unless the record affirmatively shows a want of jurisdiction; as, for example, where realty of a nonresident was attached, the summons was served by publication, the defendant appeared specially by a motion to vacate the attachment for certain defects in the return, and the court overruled the motion and entered a judgment for plaintiff, in pursuance of which the land was sold, the judgment is conclusive as to the sufficiency of the attachment in a suit to quiet title between adverse claimants of such land under an execution sale on such judgment and under a deed from the attachment debtor: *Bank of Colfax v. Richardson*, 34 Or. 518, approved and applied.

CERTIFICATE OF ATTACHMENT—EFFECT OF ERROR IN RECORDING.

2. Under Hill's Ann. Laws, § 151, the lien of an attachment depends on the date of the filing of the certificate, and a clerical mistake of the clerk, in recording it, in substituting the name of one county for another in the title of the cause, will not defeat the lien.

From Linn: REUBEN P. BOISE, Judge.

Suit by Peter Schlosser against Emily Beemer to quiet the title to certain land. The facts are stated in the opinion. There was a decree for plaintiff, from which defendant appeals.

AFFIRMED.

For appellant there was a brief over the names of *H. C. Watson* and *L. L. Swan*, with an oral argument by *Mr. Watson*.

For respondent there was a brief over the names of *Kelly & Curl* and *Hewitt & Sox*, with an oral argument by *Messrs. Percy R. Kelly* and *Henry H. Hewitt*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is a suit to determine an adverse claim to real estate. The land in controversy consists of two separate tracts, one described as the "northeast quarter of section 34," and the

other as the "east half of the northwest quarter, and the east half of the southwest quarter, of section 35, township one south, range four east of the Willamette Meridian." The Santiam River runs through both tracts, leaving fifteen acres of the first and thirty of the second in Marion County. Both parties deraign title through T. H. De Cew,—the plaintiff by a sheriff's deed, executed in pursuance of a sale made under an execution issued on a judgment recovered by him against De Cew in the circuit court for Linn County, on July 24, 1897; and the defendant by a deed direct from De Cew, dated in May of the same year, but after the property had been attached in the action mentioned. The only question on this appeal is the validity of the judgment through which the plaintiff deraigns his title.

De Cew was a nonresident, and service of summons was had on him by publication. At the time the action was begun, writs of attachment were issued to the sheriffs of Linn and Marion counties for service. On April 12 the sheriff of Linn County returned the writ issued to him, with his certificate annexed that by virtue thereof "I did, on the twelfth day of April, A. D. 1897, at the instance of the above-named plaintiff, attach the following described real property of the within-named defendant, T. H. De Cew, to wit [describing all of the N. E. $\frac{1}{4}$ of section 34 in Linn County]; also all that part of the east $\frac{1}{2}$ of the N. W. $\frac{1}{4}$, and the east $\frac{1}{2}$ of the S. W. $\frac{1}{4}$, of Sec. 35, in Tp. 9 S., R. 4 E. of the W. M., Oregon, which lies south of the North Fork of the Santiam River, in Linn County, Oregon,—by posting in a conspicuous place upon said premises a full, true, and correct copy of the original writ of attachment issued in the above-entitled cause, and certified to by me as such sheriff; there being no occupant living upon the above-described land." On the fifteenth of the same month a certificate of such attachment was filed by him in the office of the county clerk of Linn County, and by such clerk properly recorded. On April 12 the writ of attachment issued to the sheriff of Marion County was also returned, with the certificate of the officer annexed that by virtue thereof "I did, on the

twelfth day of April, 1897, at the hour of 11:30 o'clock a. m. of said day attach the following described property as the property of the above-named defendant found in my county, to wit, all that part of sections 34 and 35, township 9 south, range 4 east, Willamette Meridian, lying north of the Santiam River, in Marion County, State of Oregon, by posting a true copy thereof, prepared and certified to by me as sheriff, in a conspicuous place thereon; there being no one in possession of said real property or residing thereon." On the fourteenth a certificate of such attachment was filed with the county clerk of Marion County, but by mistake in recording it the clerk substituted the word "Marion" for "Linn" in the title of the cause. Thereafter service of summons was had upon the defendant in the action by publication, and in June he appeared specially by his counsel, and moved to dissolve and vacate the attachments on the ground that the property sought to be attached consisted of several distinct tracts, and the returns of the officers failed to show that a copy of the writs of attachment had been left in a conspicuous place on each of the tracts, and because the returns were insufficient in other particulars pointed out. The motion was overruled, and a judgment entered by default against the defendant, in which it is recited that "on April 12, 1897, the hereinafter described real property [being the property in controversy in this suit] of the defendant was duly and regularly attached by virtue of writs of attachment duly issued out of this court in this action."

1. The contention of the defendant in the present suit is that the judgment referred to against De Cew and in favor of the plaintiff is void, because no property of the defendant was legally attached before the order for publication of the summons was made, and this contention is based on the theory that the returns of the officers do not show affirmatively that a copy of the writ was left or posted in a conspicuous place on each separate tract of land attempted to be seized. This question was presented to and passed upon by the court rendering the judgment, and its conclusion cannot be questioned collaterally. The returns may be, and perhaps are, indefinite

and incomplete; but they do not show that the property was not attached. Their sufficiency was adjudicated by the court rendering the judgment, and, as we understand the law, "the judgment of a superior court against a nonresident cannot be attacked collaterally for any defect in the attachment proceedings, where such proceedings are not by statute made jurisdictional, unless the record affirmatively shows a want of jurisdiction": *Bank of Colfax v. Richardson*, 34 Or. 518, 527 (54 Pac. 359, 362, 75 Am. St. Rep. 664). The doctrine to be applied to judgments like the one involved here was considered at length and with care in the case quoted from, and the principles there announced are conclusive here.

2. Under the statute the lien of an attachment depends upon the date of the filing of the certificate [Hill's Ann. Laws, § 151; *Dickson v. Back*, 32 Or. 217 (51 Pac. 727)], and a mere clerical error by the clerk in copying it into the record will not defeat the lien.

The decree will therefore be affirmed.

AFFIRMED.

Argued 23 December, 1901; decided 20 January, 1902.

LINN COUNTY v. MORRIS.

[67 Pac. 295.]

TRIAL—CONTINUANCE—DISCRETION.

1. Trial courts have a large discretion in passing upon motions for continuances, but the authority so granted must be exercised according to legal principles and in such a way as to promote substantial justice: *Hanthorn v. Oliver*, 32 Or. 57, cited and applied.

REVIEW OF ORDER REFUSING A CONTINUANCE.

2. During an action against the second term sureties of a county treasurer to recover for alleged defalcations there were indictments pending against him,—one for failing to account for moneys coming into his hands during the first term. A continuance was asked until the indictments were disposed of, because the treasurer refused until then to testify concerning such moneys. On trial the court found that at the close of the first term the treasurer had in his possession the sum of \$1,845, and, "in the absence of the contrary, and on the presumption that he did his official duty, the court finds that he paid said sum to himself as his own successor"; and this \$1,845 formed part of the amount for which judgment was rendered against the sureties. *Held*, that it was error to refuse the continuance.

From Linn: GEO. H. BURNETT, Judge.

This is an action by Linn County, a public corporation, to recover from its late treasurer and his sureties the amount of his alleged defalcation. The complaint alleges, in substance, that the defendant P. G. Morris, having been elected treasurer of Linn County, Oregon, for a term of two years beginning July 6, 1896, executed prior thereto an official undertaking, with his codefendants as sureties, conditioned that if he should not faithfully keep, account for, and pay over, according to law, all moneys that might come into his hands by virtue of his office, they or either of them would pay the State of Oregon \$50,000, which bond was duly approved; and that of the money received by him as such treasurer he neglected and refused to pay over to his successor the sum of \$3,422.53. The answer denies the material allegations of the complaint, and avers that said sum of money belonged to the cities and to the school and road districts of said county, with which Morris had fully accounted therefor. The allegations of new matter in the answer having been denied in the reply, the defendants, on November 27, 1899, moved the court to postpone the trial until the next term, the basis of such motion being the affidavit of the defendant L. Flinn, which is to the effect that the defendants could not safely go to trial at the term then in session on account of their inability to secure the testimony of the defendant Morris, against whom two indictments were returned June 27, 1899, by the grand jury of said county,—one for converting to his own use and failing to account for money that came into his possession by virtue of his office during his first term, or prior to July 6, 1896; and the other for the same offense, alleged to have been committed during his second term, ending July 5, 1898,—which indictments are still pending in said court; that it is alleged in the complaint herein that Morris received, during his second term, of plaintiff's money, the sum of \$252,142.01, and accounted for and paid over to his successor in office only the sum of \$248,719.48, leaving unaccounted for a remainder of \$3,422.53, which he converted to his own use; that of the sum of \$252,142.01 so received \$29,768.68 came into Morris' possession during the

first term, and was paid over to himself, as his own successor, at the beginning of his second term, to be accounted for according to law; that the defendants expect to prove by Morris, and he will testify, when said indictments are finally disposed of, that during his first term he paid out, according to law, all moneys that came into his hands by virtue of his office, except the sum of \$19,931.59, which was deposited in the banks at Albany, in said county, and which sum is the only money that came into his hands during his second term from that received at the first term; that Morris will further testify that he fully accounted for all moneys that came into his possession, as said treasurer, during his second term, and that any apparent discrepancy that may be disclosed by an inspection of the books kept by him during that term occurred while he was in office the first term; that affiant had talked with one of Morris' attorneys in said criminal actions, and was informed by him that his client was entitled to claim an exemption from testifying at the trial of this action in respect to the facts stated in this affidavit upon the ground that evidence thereof given by him might tend to subject him to punishment for a felony, and that affiant had also talked with Morris, who informed him that he should claim such privilege, and he would refuse to testify as to what sum of money came into his hands at the beginning of his second term from the money received during his first, or when the apparent deficiency complained of occurred; that the defendants know of no other witness who can testify in relation thereto, nor is there any other witness by whom or evidence by which said facts can be proved; that, if the trial of this cause is continued until said criminal actions are disposed of, the defendants will produce Morris, who is a resident of said county, and he, as their witness, will testify as to said facts; that his testimony is material to the defense, and the defendants cannot safely go to trial without it, and, if compelled to do so, an injustice will be done them; and that this affidavit is not made for delay, but that justice may be done.

The motion for a continuance having been overruled, a trial was had without the intervention of a jury, and from the testimony taken the court found the facts as follows: “(1) On or about June 29, 1896, and prior to the entry of the defendant P. G. Morris upon the discharge of the duties of county treasurer of said Linn County for the term mentioned in the plaintiff’s complaint, and for the purpose of qualifying said P. G. Morris to act as such county treasurer, the defendants duly delivered the undertaking set forth in the plaintiff’s complaint to the county court of Linn County aforesaid, and said undertaking was then and there duly approved by said county court, and filed in the manner provided by law. (2) The defendant P. G. Morris was the duly elected, qualified, and acting county treasurer of said Linn County for the term ending on the first Monday of July, 1896; that being his first term in office as such county treasurer. (3) At the close of the first term of said P. G. Morris as such county treasurer, besides money deposited in banks and other money, all being the property of the plaintiff, the defendant P. G. Morris had in his possession and custody as such county treasurer the sum of one thousand eight hundred and forty-five and twenty-six one-hundredths dollars (\$1,845.26) of money not otherwise accounted for, the same and the whole thereof being then and there the property of the plaintiff. (4) In the absence of the contrary, and on the presumption that said P. G. Morris did his official duty as such county treasurer in respect to the sum of one thousand eight hundred and forty-five and twenty-six one-hundredths dollars (1,845.26) mentioned in the third finding of fact herein, the court finds as a fact that the defendant P. G. Morris paid said sum of one thousand eight hundred and forty-five and twenty-six one-hundredths dollars to himself, as his own successor in office, and had the same in his possession as such county treasurer of Linn County, Oregon, when he took office for his second term as such county treasurer. (5) At the close of his second term of office as such county treasurer there was in the possession and custody of said P. G. Morris as such county treasurer the

sum of twenty-three thousand five hundred and eighty-eight and one one-hundredths dollars (\$23,588.01), the same and the whole thereof being the property of the plaintiff and consisting of the following items, viz.: Money afterwards paid to his successor in office, \$20,177.21; money not otherwise accounted for in the first term, and in his hands at the commencement of his second term, \$1,845.26; money not otherwise accounted for in second term, \$1,565.54,—amounting, as aforesaid, to \$23,588.01. (6) Prior to the commencement of this action the defendant P. G. Morris paid to his successor in office of the money of the plaintiff remaining in his possession and custody at the close of his second term of office, as set forth in the fifth finding of facts herein, the sum of twenty thousand one hundred and seventy-seven and twenty-one hundredths dollars (\$20,177.21), and no other or greater sum. (7) Of said sum of twenty-three thousand five hundred and eighty-eight and one one-hundredths dollars (\$23,588.01), in the possession and custody of said P. G. Morris as such county treasurer at the close of his second term of office, there remains not accounted for by said P. G. Morris, or any of the defendants, a balance amounting to the sum of three thousand four hundred and ten and eighty one-hundredths dollars (\$3,410.80), the same being the property of the plaintiff; all of which the defendant P. G. Morris converted to his own private use at the close of his second term of office, and ever since then has failed, neglected, and refused, and does now still fail, neglect, and refuse, to pay or account for said sum of three thousand four hundred and ten and eighty one-hundredths dollars (\$3,410.80), or any part thereof, as required by law, or to pay the same or any part thereof, to the plaintiff or to his successor in office.” Judgment having been rendered upon these findings, the defendants appeal. REVERSED.

Messrs. Hewitt & Sox, for appellants.

Messrs. J. N. Hart, District Attorney, *H. C. Watson*, *L. L. Swan*, and *Percy R. Kelly*, for respondent.

MR. JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

1. It is contended by defendants' counsel that the court erred in overruling their motion for a continuance, and that compelling them to go to trial before the indictments against Morris had been disposed of was a denial of justice. While the statute permits a court, upon a proper showing, to postpone the trial of a cause on account of the absence of evidence (Hill's Ann. Laws, § 179), the rule is well settled in this state that the granting or refusal of a motion for a continuance is discretionary, and will not be reviewed on appeal unless it satisfactorily appears that there has been an erroneous exercise of judicial authority: *State v. O'Neil*, 13 Or. 183 (9 Pac. 284); *State v. Hawkins*, 18 Or. 476 (23 Pac. 475); *State v. Howe*, 27 Or. 138 (44 Pac. 672); *State v. Fiester*, 32 Or. 254 (50 Pac. 561); *State v. Wong Gee*, 35 Or. 276 (57 Pac. 914); *Lew v. Lucas*, 37 Or. 208 (61 Pac. 344). In *Mitchell v. Campbell*, 14 Or. 454 (13 Pac. 190), Mr. Justice STRAHAN, in speaking of the exercise of such authority, and the supervision thereof by an appellate court, says: "In ordinary cases the court will not interfere with the discretion of the trial court in matters of practice before it. The law has wisely vested those courts with very large discretionary powers in such matters; but it is a judicial discretion, not to be capriciously or oppressively exercised." The judicial discretion that is not subject to review on appeal is such an exercise of authority in the mode of proceeding for the enforcement of rights or the redress of wrongs as is reasonably designed, according to fixed legal principles, to promote substantial justice: *Powell v. Dayton S. & G. R. R. Co.* 14 Or. 22 (12 Pac. 83); *Thompson v. Connell*, 31 Or. 231 (48 Pac. 467, 65 Am. St. Rep. 818); *Hanthorn v. Oliver*, 32 Or. 57 (51 Pac. 440, 67 Am. St. Rep. 518); *Coos Bay Nav. Co. v. Endicott*, 34 Or. 573 (57 Pac. 61). In *Hyde v. State*, 16 Tex. 445 (67 Am. Dec. 630), it was held that evidence produced at the trial will be considered in reviewing a refusal to grant a continuance, the court saying: "But in considering the case upon appeal, where the motion for a new

trial brings before us a statement of the evidence upon the trial, we do not feel bound to shut our eyes wholly to the facts of the case in considering whether the judgment ought to be reversed for the refusal of the court to grant a continuance. If, upon the trial, there had appeared to be cause to apprehend that a continuance was improperly refused, a new trial must have been granted. But if, on the contrary, it very satisfactorily appears that the application for a continuance could not have been well founded in fact, it must afford an additional reason for refusing a new trial, or to reverse the judgment on that ground."

2. In the light of this rule we will examine the findings of fact as an epitome of the evidence, to determine whether any error was committed in refusing to postpone the trial. The court found that Morris, as treasurer, had in his possession at the close of his first term, in addition to the money belonging to Linn County, then on deposit in the banks, the sum of \$1,845.26, and that, in the absence of any evidence tending to show that he had converted this sum to his own use during his first term, the court, by invoking the disputable presumption that official duty had been regularly performed (Hill's Ann. Laws, § 776, subd. 15), deduced the fact that Morris paid this sum over to himself as his successor in office. The court further found that he failed to account for the sum of \$3,410.80, of which \$1,845.26 of the money so received during his first term formed a part. The bill of exceptions, in explaining the method of reaching this conclusion, is as follows: "The plaintiff, to further sustain the issues on its part, introduced the books and accounts kept by the said P. G. Morris as such treasurer during the first term of office, showing that at the close of his said first term the said Morris, as such treasurer, besides the money deposited in the banks and other moneys, all being the property of the plaintiff, had in his possession and custody as such treasurer the sum of \$1,845.26, not otherwise accounted for, the same being the property of the plaintiff. There was no other evidence, except that derived from said books, as above stated, showing or tending

to show that the said sum of \$1,845.26 was or was not turned over by the said Morris to himself as his own successor at the beginning of his second term of office as such treasurer of Linn County, Oregon." If Morris' codefendants had been sureties on his first official undertaking, no prejudice could have resulted from the court's refusal to grant a continuance, for, having covenanted to answer for the principal's default, the sureties could have no legal cause to complain on the ground that their obligation was being enforced. Flinn's affidavit shows that, if the indictments against Morris were disposed of, he would testify that the apparent defalcation occurred during his first term. The transcript discloses that the defendants called Morris as their witness, and propounded to him a question in regard to this matter; but he, claiming the privilege which the law guaranties in such cases, was excused by the court from answering the interrogatory. It will thus be seen that a possible injustice has been done to the codefendants herein, whereby they are adjudged to pay a charge of \$1,845.26 which should have been imposed upon the sureties on Morris' first official undertaking. The district attorney had charge of the criminal action against Morris, and also conducted the trial of this action. He may have thought that by trying this action first he could obtain evidence with which he might secure convictions on the indictments, and for this reason adopted the method pursued; but by doing so a great injustice may have been inflicted upon the codefendants.

In *State v. Harras*, 22 Wash. 57 (60 Pac. 58), it was held that when a person charged with the commission of a crime asked for a continuance on the ground that the evidence of one convicted of perjury was important for the defense, and that an appeal was pending from such conviction, it was error to deny a continuance until the appeal was determined. Mr. Chief Justice GORDON, speaking for the majority of the court, in deciding the case, says: "But we cannot overlook the fact that appellant has been deprived of the benefit of the testimony of a witness, not because of any act for which he is responsible, but because of an illegal judgment of conviction against such

witness. Manifestly, he has not had the benefit of those rights which are vouchsafed to him by the constitution, among which is the right to have witnesses examined in his own behalf. He has committed no act by which the right has become forfeited. The error in the *Guse Case* was not of his making, nor is it for this court to say that the testimony of Guse would have availed the defendant nothing. If he should testify before the jury as set forth in the affidavit for a continuance, and the jury should believe his testimony, it would entitle the appellant to acquittal; and the question of the credibility of Guse would be one resting solely with the jury. Here is a condition never contemplated by the legislature when it specified what should constitute a sufficient cause for continuance. If the defendant has been deprived of the right to make a defense through no failure or neglect of his own, it would be a shame and a reproach to the law to hold him accountable for the law's mistake. The case involves something more than a mere question of the exercise of discretion by the trial judge in refusing an application for a continuance. It involves the larger question of a defendant's right to have witnesses examined in his behalf. It involves the constitutional right of fair trial. Better—far better—that the course of justice be slow, than that in making haste we should break down those safeguards which experience has shown to be necessary for the welfare and protection of the rights of the citizen. The argument of the prosecution does not meet the question. It is not enough that the record should satisfy us of the actual guilt of the prisoner. The duty is upon the state to demonstrate his guilt by legal evidence, upon a fair trial, where no constitutional or legal right is denied him." Flinn's affidavit shows that Morris was the only person by whom the defendants could expect to prove that the entire defalcation did not occur during his last term of office. Fear of conviction under the indictments evidently restrained him from testifying in relation to this important matter, and, as the district attorney had charge of the criminal actions, and was apparently holding the indictments in abeyance until this action was tried, we think the court exer-

cised its authority erroneously in not postponing the trial herein until the indictments were disposed of.

It follows from this conclusion that the judgment is reversed, and a new trial ordered. **REVERSED.**

Argued 3 December; decided 30 December, 1901.

MILLS' ESTATE.

KNIGHT v. HAMAKAR.

[67 Pac. 107.]

40	424
46	55

40	424
48	313

SUFFICIENCY OF PETITION TO REMOVE ADMINISTRATOR—JUDICIAL NOTICE.

1. A statement in a petition for the removal of an administrator that the estate is indebted to petitioner, that certain prior proceedings therein, which are referred to, show the nature and history of petitioner's claim, is not a statement of a conclusion, but is a sufficient allegation of petitioner's interest to show his right to petition under Hill's Ann. Laws, § 1094, authorizing any creditor or person interested in an estate to petition for the removal of an administrator, as the court will take judicial notice of the record of such former proceedings.

ALLOWANCE OF ATTORNEYS FEES TO ADMINISTRATOR—STATUTES.

2. Section 1178 of Hill's Ann. Laws, authorizing the allowance of attorney's fees to an administrator in the settlement of his account, does not limit the right to grant such fees to the final settlement, and the county court may make allowances to the attorneys during the time the estate is being settled.

REMOVAL OF ADMINISTRATOR—WHO MAY PETITION FOR.

3. A person who has performed services for an estate, a claim for which has been allowed by the county court, has an interest in such estate sufficient to authorize him to petition for the removal of the administrator, under Hill's Ann. Laws, § 1094, providing that any creditor of an estate, or any person interested therein, may apply for the removal of an administrator.

NATURE OF CLAIM OF ATTORNEY FOR AN ESTATE.

4. The claim of an attorney against an administrator for services rendered to an estate is a claim against both the administrator and the estate, and it is not affected in any way by the failure of the administrator to perform his trust duty.

REASONS FOR REMOVAL OF AN ADMINISTRATOR.*

5. Under Hill's Ann. Laws, §§ 1094, 1100, authorizing the removal of any administrator who has been unfaithful to or neglected his trust, an administrator who has sold real estate under order of the county court and reported

*NOTE.—Under previous rulings of this court executors or administrators may be removed by county courts, either *sua sponte* or on the petition of some interested person, for neglecting to file an inventory as required by the statute (*Holladay's Estate*, 18 Or. 168, 22 Pac. 750; *Mills' Estate*, 22 Or. 210, 29 Pac. 443; *Barnes' Estate*, 36 Or. 279, 59 Pac. 464, 5 Prob. Rep. Ann. 823,

that the sale was for cash, and then, in pursuance of an order of confirmation, has delivered to the purchaser a deed, all without receiving any money, is guilty of such neglect of his trust as to justify his removal.

DENIALS ON INFORMATION AND BELIEF.

6. Where a petition for the removal of an administrator charges that the administrator made certain admissions showing disobedience of an order of court, a denial of such statement on information and belief in the answer of the administrator may be stricken out, as a denial on information and belief of matters presumptively within the defendant's knowledge is insufficient.

STRIKING OUT IMMATERIAL AVERMENTS.

7. Where a petition for the removal of an administrator is based upon the petitioner's claim as a creditor of the estate, and the answer denies that the estate is indebted to petitioner, a further denial that the petitioner has any interest in the estate, or to the proceeds, or in the disposition thereof, is not responsive to any averment of the petition and may be stricken out.

IDEM.

8. Averments of new matter in an answer, not connected with any matter stated in the complaint, are immaterial and should be stricken out on motion; as, where a petition for the removal of an administrator is based on an allowed claim for attorney's services performed for the estate under a prior administrator, and there is no claim for services since the defendant was appointed, an allegation in the answer that petitioner performed no services for the estate or the defendant since the latter was appointed is immaterial, and should be stricken out.

EVIDENCE OF ALLOWED CLAIM AGAINST AN ESTATE.

9. An order of a county court that a certain sum demanded for services to an administrator "is a legal and valid claim against said estate for expenses of administration," establishes the demand as an allowed claim, and makes the owner thereof a creditor of the estate.

From Klamath: HENRY L. BENSON, Judge.

This is a proceeding in The Matter of the Estate of W. H. Mills, Deceased, to remove J. W. Hamakar as administrator. The county court having granted the prayer of the petitioner, the case was removed to the circuit court, with the same result, whereupon the administrator again appealed. **AFFIRMED.**

For appellant there was a brief over the names of *Reddy, Campbell & Metson* and *J. W. Hamakar*, with an oral argu-

with note, Effect of Failure to File an Inventory); for general mismanagement and neglect (*Partridge's Estate*, 31 Or. 297, 51 Pac. 82); or because the officer's personal interests are in conflict with his official duties (*Mills' Estate*, 22 Or. 210, 29 Pac. 443; *Marks v. Coats*, 37 Or. 609, 62 Pac. 488).

—REPORTER.

ment by *Mr. Hamakar, in pro. per.*, and *Messrs. J. A. Jeffrey and Geo. G. Bingham.*

For respondent there was an oral argument by *Messrs. R. J. Fleming and John H. McNary.*

MR. JUSTICE MOORE delivered the opinion.

This is a proceeding, originally commenced in the county court of Klamath County, to remove an administrator. The petition of N. B. Knight therefor states, in effect, that the estate of W. H. Mills, deceased, is indebted to him in the sum of \$1,329, with interest from March 12, 1892, as appears from the orders and decrees of said court of March 11, 1892, January 8, 1895, and July 12, 1895, no part of which has been paid; that since September —, 1894, J. W. Hamakar has been and now is the duly appointed, qualified, and acting administrator *de bonis non* of said estate; that in pursuance of an order of said court, Hamakar on May 4, 1895, sold to L. T. Garnsey certain real property belonging to said estate for the sum of \$3,440, and two days thereafter filed a report showing that said sale had been made for cash; that, relying thereon, said court confirmed the sale, and ordered a conveyance of the property to the purchaser, in pursuance of which Hamakar executed and delivered a deed thereof to Garnsey; that the report of said sale was false and fraudulent, and that the purchaser had not then nor has he since paid for the land so purchased; that Hamakar, in the presence of certain persons, stated that Garnsey had not paid him the amount of his bid; that the administrator has violated his trust, and is wasting the estate, to the probable loss of the petitioner, who prays that he may be removed and required to pay into court the money so due from Garnsey to said estate. A demurrer to the petition, on the ground that it did not state facts sufficient to constitute a cause of suit, or to entitle the petitioner to the relief demanded, having been overruled, an answer was filed denying the material averments of the petition, and alleging, in substance, that Hamakar, on October 8, 1895, accounted for

the money received from said sale; that the petitioner has a claim for services alleged to have been performed for a former administrator of said estate, the validity of which is disputed, and the controversy in respect thereto is pending in the supreme court. The court, upon motion, struck from the answer the following denials: "As to whether or not, on or about November 28, 1895, or at any other time, at any place, or in the presence of any person or persons, said administrator ever stated that said Garnsey had or had not paid him the amount of his bid for said, or any, real property, said administrator has no knowledge or information sufficient to form a belief, and therefore denies the same. Further answering said petition, said administrator denies that petitioner has any interest in said estate, or in the proceeds thereof, or the disposition made, or to be made, of the same." The court also, upon motion, struck from the answer the following allegation: "That said petitioner has performed no service for this administrator, or for said estate, since the beginning of his administration thereof, and that he has no other claim against said estate than as above stated." The allegations of the new matter remaining in the answer having been denied in the reply, a trial was had, resulting in the relief prayed for, whereupon Hamakar appealed to the circuit court for said county, which affirmed the order of the county court, and from the latter decree he appeals to this court.

1. It is contended by appellant's counsel that the allegation in the petition that the Estate of W. H. Mills, deceased, is indebted to the petitioner, etc., is an averment of a conclusion of law, that the petition does not state facts sufficient to constitute a cause of suit, or to entitle the petitioner to the relief demanded, and that, notwithstanding an answer was filed after the demurrer was overruled, the defect in the petition was not thereby waived, and may be insisted upon in this court. The statute prescribing the method of securing the removal of an executor or administrator provides, in effect, that any creditor of the estate, or other person interested therein, may apply for the removal of such representative who has in any way

been unfaithful to or neglected his trust, to the probable loss of the applicant. Such application shall be by petition, and upon notice to the administrator, and if the court find the charge to be true it shall make an order removing him and revoking his letters: Hill's Ann. Laws, § 1094. It will be remembered that the petition calls attention to certain orders of said court, whereby Knight claims the estate is indebted to him in the sum specified. It appears from the transcript that the decrees of the county court referred to, when examined in the order in which they were made, show (1) that Fred H. Mills, a former administrator, was ordered to sell the real property of said estate to pay the claims against it and the expenses of the administration; that the petition upon which said order was based shows that Hamakar's claim of \$2,500 had been allowed by said administrator, who also claimed, on account of expenses incurred in the performance of his trust, the sum of \$1,329 due Knight, as attorney fees; (2) that the objections of the heirs of the decedent, interposed to Knight's claim, were dismissed; and (3) Knight's claim, an itemized statement of which, purporting to have been examined and allowed December 11, 1891, by Mills as administrator, and filed September 3, 1894, amounting to the sum of \$1,329, with interest at eight per cent from March 11, 1892, was decreed a legal and valid claim against said estate.

The rule is well settled that a county court, in determining the sufficiency of a petition for the removal of an administrator, should take judicial notice of its records and prior proceedings in the administration of the estate: *In re Bennett* (D. C.) 84 Fed. 324; *Pittel v. Fidelity Mut. Life Assoc.* 86 Fed. 255 (30 C. C. A. 21); *State v. Bowen*, 16 Kan. 475; *Robinson v. Brown*, 82 Ill. 279; *State v. Postlewait*, 14 Iowa, 446. In *White v. Spaulding*, 50 Mich. 22 (14 N. W. 684), a case upon which appellant's counsel rely, it was held that a petition for the removal of an administrator is insufficient if it is not presented by persons interested, or does not allege sufficient cause. Mr. Justice COOLEY, speaking for the court in respect to two applicants for an order removing an administrator, says:

“The other petitioners claim to be principal creditors. The fact that they are such is left to stand upon their naked assertion, without specification or explanation. What are their claims, and when did they accrue? Neither the record nor the petition gives us any light on that subject.” In the case at bar, the petition avers that Knight is a creditor of said estate, and the record, of which the county court was bound to take judicial notice, discloses the nature of his claim, when it arose, what it was for, and when it was allowed. His claim for attorney fees was an expense incurred by a former administrator in the performance of his duties, presumably incident to his trust, for the payment of which his successor became liable: *Willcox v. Smith*, 26 Barb. 316, 328; *Hoes v. Halsey*, 2 Dem. Sur. 577; *Mygatt v. Willcox*, 1 Lans. 55; *Ferrin v. Myrick*, 41 N. Y. 315; *In re O'Brien's Estate* (Sur.) 25 N. Y. Supp. 704.

2. It is argued however, that Mills, the former administrator, never having settled his accounts as the representative of said estate, was not entitled to be allowed any sum as attorney fees, and, this being so, Knight, his attorney, is not a creditor of the estate. The statute provides that an executor or administrator shall be allowed, in the settlement of his account, all necessary expenses incurred in the settlement of the estate, including reasonable attorney fees in any necessary litigation or matter requiring legal advice or counsel: Hill's Ann. Laws, § 1178. The transcript shows that Fred H. Mills was removed as administrator because he was adversely interested in certain property claimed to belong to the estate [*Mills' Estate*, 22 Or. 210 (29 Pac. 443)], but it fails to show that he ever made a final settlement with the county court in relation to his trust. He made several reports, however, purporting to show the condition of the estate, and the question to be considered is whether his failure to make a final settlement prevents the court from allowing reasonable attorney fees incurred while he was discharging his trust. The statute does not limit the authorization of such fees to the final settlement of the accounts of an administrator or executor, so as to preclude an

allowance therefor prior to such settlement, and the county court, being a court of general and superior jurisdiction in probate matters [*Tustin v. Gaunt*, 4 Or. 305; *Farley v. Parker*, 6 Or. 105 (25 Am. Rep. 504); *Monastes v. Catlin*, 6 Or. 119; *Adams v. Petrain*, 11 Or. 304 (3 Pac. 163); *Steele v. Holladay*, 20 Or. 70 (25 Pac. 69, 10 L. R. A. 670)], we think may allow an attorney fee, even if no final report be filed.

3. It is possible that Knight, as a creditor of Mills, the former administrator, was not a creditor of the estate in the strict sense of the term (*Carroll v. Huie*, 21 La. Ann. 561), but he had such a claim against the administrator personally as might, upon the approval of the county court at the final settlement of the estate, become a valid charge against it, so as to give him an interest therein; and, this being so, the statute adverted to (Hill's Ann. Laws, § 1094) made him a competent petitioner for the removal of the administrator. The petitioner alleged that the estate was indebted to him, thereby impliedly averring that he was a creditor of it; but as the facts constituting his right as such are set out in the petition, from which it appears that he is interested in the estate, he is entitled to the relief warranted by the facts alleged, notwithstanding the averment of indebtedness is the statement of a mere legal conclusion: 16 Ency. Pl. & Pr. 794. While the claim of an attorney for services rendered to an executor or administrator is originally against the representative of the estate, when examined, approved, and allowed by the county court, it becomes a claim against the estate; but, having been made without notice to the creditors, and upon an *ex parte* application therefor, the order making the allowance is interlocutory, and upon objection thereto may be subsequently modified or set aside by the court upon the final settlement of the estate, or, upon its refusal to do so, by the circuit or supreme court upon appeal: *Osburn's Estate*, 36 Or. 8 (58 Pac. 521); *Hollis v. Caughman*, 22 Ala. 478. Knight's claim was examined and allowed December 11, 1891, by Mills as administrator, who was authorized to employ an attorney when necessary, and under the statute had power to bind the estate

to pay for his services such a sum as they were reasonably worth: Hill's Ann. Laws, § 1178; *McCullough's Estate*, 31 Or. 86 (49 Pac. 886). It was filed in the county court prior to the act of February 25, 1895, amending Section 1170, Hill's Ann. Laws (Laws 1895, p. 89), requiring the executor or administrator of an estate to render an account in April and October of each year, so that if notice to interested parties can be implied from the allowance of an item of expense incurred in the management or settlement of an estate, from the filing of the account at the times prescribed, such notice cannot be invoked in this case, and hence the allowance of the claim by the administrator does not make out a *prima facie* case in favor of its validity, if objected to on final accounting, but the claimant must substantiate the reasonableness of the several charges by proof thereof: *Chambers' Estate*, 38 Or. 131 (62 Pac. 1013). It may be, however, that the order of the county court establishing the validity of Knight's claim is binding upon all parties in interest; but to have this effect the record must show that notice of the time appointed for the hearing thereof was given, or that said parties were present at the settlement: *Hollis v. Caughman*, 22 Ala. 478. What has been said in respect to this claim is not intended in any manner to impugn its validity, but to show that, if it has been allowed in the manner prescribed by law, he is a creditor of the estate; if not, he has a claim against it which makes him interested therein, so that in either event he is a proper person to petition for the removal of the administrator.

4. An attorney who is retained by an executor or administrator in any litigation necessary to the decedent's estate, or whose advice or counsel is requisite to enable such representative properly to discharge his duty in the performance of his trust, has a valid claim against the person by whom he is employed; but the executor or administrator, being a trustee and agent of the estate, the attorney has also a valid claim against it for his reasonable fees. If the representative thereof were authorized to employ him, and the contract of employment be valid when made, and the services actually rendered

and necessary to the estate, it, as the principal, is liable to him for the payment of such fees, regardless of whether the executor or administrator, as its agent or otherwise, performs his duty.

5. It is contended that the petition does not state facts sufficient to support the order removing Hamakar as administrator, and hence that the court erred in making it. Mr. Schouler, in his work on Executors and Administrators (Section 157), in discussing this subject, says: "As a general rule, where the probate court has once regularly conferred the appointment, it cannot remove the incumbent afterwards except for causes defined in the statute." The statute provides, in effect, that whenever it appears probable to the court or judge that an executor or administrator has become of unsound mind, or been convicted of any felony, or a misdemeanor involving moral turpitude, or who has in any way been unfaithful to or neglected his trust, to the probable loss of any heir, legatee, devisee, creditor, or other person interested in the estate, it shall be the duty of such court or judge to cite such executor or administrator to appear and show cause why he should not be removed, and, if he fail to appear or to show sufficient cause, an order shall be made removing him and revoking his letters: Hill's Ann. Laws, §§ 1094, 1100. The petition avers, in substance, that Hamakar, having been authorized to sell the real property belonging to said estate for cash, made a sale thereof under the power conferred, and falsely reported that he had received from Garnsey the cash therefor, and that the county court, relying thereon, confirmed the sale, in pursuance of which Hamakar executed and delivered a deed of the premises to the purchaser. We think the petition specifically stated facts which, if true, conclusively showed that the administrator had neglected his trust, within the cause defined by the statute.

6. It is contended that error was committed in striking from the answer certain denials and the allegations of new matter. It will be remembered that the petition stated that Hamakar in the presence of certain persons, declared that Garnsey had

not paid him the purchase price of the real property so sold. This was not a statement of any material fact constituting a cause for the administrator's dismissal, but was an attempt to plead evidence, and ought to have been stricken out on motion. Instead of doing so, Hamakar answered, denying the statement upon information and belief. This he was not permitted to do, for if the facts averred in the declaration are presumptively within the defendant's knowledge a denial on information and belief is insufficient: 1 Ency. Pl. & Pr. 811; *Hanna v. Barker*, 6 Colo. 303; *Humphreys v. McCall*, 9 Cal. 59 (70 Am. Dec. 621); *San Francisco Gas Co. v. City of San Francisco*, 9 Cal. 453. Thus, if it is averred that acts are done in his presence, a denial of the character averred is not sufficient: *Edwards v. Lent*, 8 How. Prac. 28. No error was committed in striking out this denial.

7. The answer denied that said estate was indebted to Knight in the sum of \$1,329, or in any sum; and as his petition for the removal of the administrator was based upon his claim as a creditor of the estate, the denial to the effect that Knight has any interest in said estate, or in the proceeds thereof, or the disposition made or to be made of the same, is not responsive to any averment of the petition, and being a repetition of a preceding denial no error was committed in striking it out.

8. The averment of new matter in the answer to the effect that Knight had performed no service for the estate or for Hamakar since he was appointed administrator thereof, and that the petitioner has no claim against said estate, except as above stated, is immaterial, for it appears from the petition that Hamakar was appointed administrator in September, 1894, while Knight's claim for attorney fees matured March 11, 1892; and as no issue existed in respect to this averment, no error was committed in striking it out.

9. It is maintained that the evidence fails to show that said estate was indebted to Knight. We think the following finding of the county court, made July 12, 1892, viz., "that said claim of N. B. Knight for services and expenses as attorney

in said estate, amounting to \$1,329, together with interest thereon at the rate of eight per cent per annum from March 11, 1892, is a legal and valid claim against said estate for expenses of administration,"—clearly establishes a claim against said estate, and that until the order based thereon is set aside, modified, or reversed, the estate was indebted to Knight in the sum so specified.

Considering the case upon the merits, the transcript shows that Fred H. Mills, the former administrator, not having sold any of the real property of said estate under the authority delegated March 11, 1892, the county court, January 8, 1895, in pursuance of Hamakar's petition therefor, ordered him to sell said property at public auction for cash, payable in lawful money of the United States upon the confirmation of the sale. Hamakar's report was filed on May 4, 1895, and shows that on that day, in pursuance of the order of said court, he sold at public auction certain real property of said estate to Garnsey for the sum of \$3,440, upon the terms prescribed, receiving therefor, at the time of sale, 20 per cent. of the purchase price, the remainder to be paid upon the confirmation of the sale. No objection to said report having been made, the court, on May 7, 1895, ordered the sale confirmed, and directed Hamakar to execute and deliver a deed conveying said real property to the purchaser upon his payment of the full purchase price. It is alleged in the petition, and not denied in the answer, that Hamakar on June 18, 1895, executed and delivered to Garnsey a deed to said real property, which deed is recorded in book No. 9, records of deeds of said county, at page 393, *et seq.* The answer admits, "that said L. T. Garnsey had not, at the time of reporting said sale, paid the full amount of his said bid, but denies that any part of said bid remained unpaid at the date of the commencement of this proceeding." which was begun March 25, 1896, by filing the petition. When it is remembered that 20 per cent. of the purchase price was paid at the time of the sale, and that the deed was delivered June 18, 1895, at which time the remainder was payable, the denial that any part of said bid remained unpaid March 25,

1896, would seem to be an admission that Garnsey did not pay the remainder of his bid upon receiving the deed. John F. Miller, a witness for the petitioner, testified that Hamakar, at Klamath Falls, in said county, on November 28, 1895, stated in his presence, and in the presence of others, that he was going to San Francisco, and upon his return would pay the money, which was in his hands on account of the sale of said property, to the parties to whom it was due. The petitioner, as a witness in his own behalf, testified that, on the occasion referred to by Miller, Hamakar said in their presence, referring to the money due from Garnsey on his purchase of said property, that when he went below, meaning to San Francisco, California, he would make them agree to pay this money over, and that upon his return he, in answer to the inquiry, "Why didn't you have Garnsey pay that money in?" said, "No, they wouldn't pay it over,"—and he did not believe they had any money to pay over; that, Hamakar having gone to San Francisco, Knight sent him a telegraphic message February 3, 1896, requesting him to deposit with a firm in that city \$600 on account of the attorney fee claimed by him, and on the same day received from him a message as follows: "Cannot; no money here yet." John S. Orr, a witness for petitioner, testified that about March 6, 1896, Hamakar in answer to the question whether Garnsey had paid him the money due on account of the purchase of said land, said "No." Hamakar was present at the trial, but did not become a witness in his own behalf so as to deny the declarations so imputed to him in respect to his failure to collect the money due from Garnsey. In our opinion he neglected his trust by failing to comply with the order of the county court, in delivering the deed to Garnsey without having received the remainder of the purchase price, and, this being so, the decree of the circuit court from which this appeal was taken is affirmed.

AFFIRMED.

Decided 10 March; rehearing denied 7 April, 1902.

JOHNSON v. PORTLAND STONE COMPANY.

[67 Pac. 1013, 68 Pac. 425.]

DUTY OF MASTER TO SERVANT—DELEGATION OF DUTY.

1. It is the duty of a master to exercise reasonable care to provide his servants with reasonably safe places to work, with reasonably competent fellow-workmen, and, in proper cases, to make needful rules for the safe conduct of the business; and the master cannot exempt himself from liability for non-observance of these duties by delegating them to any servant or employee: *Mast v. Kern*, 34 Or. at p. 251, approved.

WHO ARE FELLOW-SERVANTS.

2. Persons who work together in a quarry drilling holes for blasts and loading them with powder are fellow-servants, though one takes the lead and gives directions, so that his negligence is a risk assumed by the others: *Anderson v. Bennett*, 16 Or. 515, distinguished.

ASSUMING RISK OF CARELESS FELLOW-SERVANT.

3. A servant who continues to work with a careless or incompetent fellow-servant, knowing him to be so, and without complaint cannot be heard to say the master was negligent in keeping him, for he assumed the chance of injury resulting from such servant's carelessness.

PROMULGATION OF RULES.

4. A master is not negligent in failing to adopt and enforce rules for the conduct of his business, or a particular department of it, unless reasonable care should have foreseen the necessity for them; thus, there is nothing in the business of drilling out the tamping from a hole loaded for a blast which has failed to explode, that calls for the promulgation of rules by the master, the selection of means therefore being a detail depending on the judgment of the workmen.

From Multnomah: ALFRED F. SEARS, JR., Judge.

Action by C. O. Johnson against the Portland Granite & Stone Co. to recover damages for a personal injury. There was a judgment for plaintiff, from which defendant appeals.

REVERSED.

For appellant there was a brief and an oral argument by *Mr. Ralph W. Wilbur*.

For respondent there was a brief over the name of *Cake & Cake*, with an oral argument by *Mr. Harry M. Cake*.

40	436
42	541
40	436
45	481
40	436
48	38

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is an action to recover damages for personal injuries alleged to have been received by the plaintiff through the negligence of the defendant. In 1899 the defendant owned and operated a stone quarry in Whitman County, Washington. For some months prior to August of that year the plaintiff had been working in the quarry with other employes under the charge of a superintendent or manager, excavating and removing rock by blasting. Among the workmen was one Nelson, who acted as powder man, and whose business was to load and discharge holes drilled by himself and other employes. The plaintiff was a common laborer, and his particular work was drilling holes at such places as might be designated by the foreman in charge of the work, and assisting Nelson, the powder man, by carrying sand, powder, and other supplies as requested by him. About the time the plaintiff commenced work he was directed by the foreman to work with Nelson, and as this order was never countermanded he continued to so work until disabled by the accident; he, Nelson, and a workman named Krahtsch working together in a kind of "gang" at drilling when there were no holes to load, and the plaintiff and Krahtsch assisting Nelson when he was using powder. Nelson had no control over either Johnson or Krahtsch, except when they were helping him in loading the holes, and then only to direct them what to do. On the afternoon of July 31 an attempt was made by Nelson to fire two blasts, but for some reason one of them did not explode, and on the next morning, while he, Johnson, and Krahtsch were attempting to remove the tamping from the missed hole, the drill came in contact with the charge, and exploded it, severely injuring plaintiff.

The plaintiff's version of what occurred and how the accident happened is substantially as follows: "When I went out to the quarry from the bunk house, Mr. Nelson met Krahtsch and myself at the blacksmith shop, and handed us a gunny sack apiece, and told us to go down to the river and get some sand and bring it up to the quarry, saying that he was going

to reload the hole which he shot off the night before. When we got to the quarry Nelson was there, and had an iron spoon in his hand scratching out the dirt from the hole that the tamping was in. From the dirt lying around and the appearances, I thought it had gone off. I said to Mr. Nelson when I came up, 'It did not blow all the tamping out?' and he said, 'No, we will drill it out;' and I said, 'It is all right then, is it?' and he said, 'Yes; it is all right.' Krahtsch and I then commenced to drill out the tamping. As the drill was too short, Krahtsch went to get another, and while he was away Nelson took hold of the drill, and while he and I were turning it in the hole the charge exploded. Nelson ordered us to drill out the tamping. I did not see any tamping in the other hole. It showed plainly that it had been a complete explosion. I did not fear that there was a load in the hole, for Nelson said that it was all right, and I thought he knew it had gone off. I depended upon him, and never objected to assisting him to take the tamping out of the holes. I have known Nelson since 1895. Worked in quarries with him. He is what is regarded as a fast workman. When I went to work in the granite quarry, the foreman told me to go and work with Nelson, and from that time on he always called me when he needed help. I made no objection to working with him, and had an opportunity to see and know how he did his work." The testimony of Krahtsch, the only other witness present at the time of the accident, is substantially as follows: "I have had three or four months' experience as a powder man. I began work at Granite Point in April, 1899, and worked until the twelfth of December the same year. Nelson was powder man during the time. I worked in the same gang as Johnson and Nelson. We drilled together on the morning of the thirty-first of July. On the morning of August 1, at half past three, we went to work, and Nelson said to Johnson and myself, 'Go down to the river, and get a sack of sand apiece, and bring it up to the top of the hill, and I'll go to the powder house and get the powder ready. We are going to drill the tamping out of this hole, and blow the stone over.' The blast that was put in on

the evening of July 31 was to turn the stone over or crack it, in the first place, which is called a spring shot. Nelson said, 'I will go and get the powder ready. We are going to drill the tamping out of this hole again, and throw the stone over.' When I got up to the hole Johnson was already there, and Nelson was scraping the tamping out with a spoon, and throwing it around the hole. After the hole is deep enough to hold water, the custom is to put in the drill, and commence drilling, and take the swab stick and swab it out. When we came up I cannot remember anything particular that was said, only that Johnson said, 'Is the hole all right?' and Nelson said, 'Yes; the hole is all right.' We then put some water in, and Johnson and Nelson commenced to drill. After he put the water in again, I said to Nelson, 'Give me the drill; you do your powder work or your other work, and Johnson and I will do the drilling.' In some quarries it is the custom for persons assisting the powder man to rely upon him for his safety; in others, not. In some the powder man works by himself, and in others he has assistants or helpers. In the granite quarry Nelson had a gang. Johnson and myself were his gang. Of course, when Nelson said to go to work we had to do it, as Nelson was to know what was going on. He was required to be sure that the hole was all right to drill out. It was his business to know. Johnson had nothing to do with it, but had to take what Nelson said. When a driller is assisting a powder man, and is told by the powder man to do something, he has to do whatever he is told. I can't remember who sent me to work with Nelson,—whether it was Cole or the foreman. There was nothing about the condition of the hole that made me afraid to drill it out. The regular way of taking tamping out of an unexploded hole is with a spoon to begin with, and then they usually use a drill for the sand and stuff before they use a mud stick. I never objected to working with Nelson. If I had, I guess I would have been discharged. Water is put in the holes to keep the drill from striking fire. We were not preparing for a sand blast, but wanted to load the hole again to refire it." There

was also evidence tending to show that Nelson was known among the workmen as a fast workman, and in his haste was sometimes careless, and did not exercise proper caution in handling powder. Upon these facts, the question is whether the defendant is liable for the injury received by plaintiff.

The grounds of recovery alleged in the complaint are: (1) That plaintiff was not provided a safe place in which to work, because of the negligence of Nelson in ordering and permitting him to use a steel drill to remove the tamping from a missed hole; (2) that Nelson, the powder man, was incompetent, and the defendant was negligent in retaining him in its service after knowledge of such incompetency; and (3) that defendant was negligent in not promulgating rules and regulations by the observance of which the plaintiff could have avoided the danger.

1. It is the duty of the master to exercise due care to provide his servant a reasonably safe place in which to work, reasonably competent fellow-workmen, and, when the exigencies of the business require, to make needful rules and regulations for the safe conduct of the business, and he cannot exempt himself from liability by delegating these duties to any servant or employe, whatever his rank. This doctrine has been so often announced by this court that it is needless to cite authorities in its support. But when the master has provided for the servant a reasonably safe place in which to work he is not responsible because it is afterwards made dangerous by the carelessness or negligence of a coservant or employe, while in the discharge of duties pertaining to a mere operative, even though he be the superintendent or foreman in charge of the work: *Mast v. Kern*, 34 Or. 247 (54 Pac. 950, 5 Am. Neg. Rep. 88, 226, 75 Am. St. Rep. 580), and notes.

2. This is the principle by which, in our opinion, this branch of the case must be determined. The place where the plaintiff was injured was not made unsafe or dangerous through any fault or negligence of the defendant, nor any one representing it, in the discharge of any duties which it owed to its servants. If there was negligence at all, it was in the plaintiff and his

associates failing to properly and safely carry out the details of the work, and not in the master's failure to provide a reasonably safe place to do the work. The removing of the tamping and reloading the missed hole was incident to the work in which Nelson and plaintiff were engaged, and was a part of their duties. In its performance they were, as to such work, fellow-servants, and the negligence of either was not chargeable upon the common master. They were, at the time of the accident, co-operating in the performance of the same business, working side by side, and the fact that Nelson took the lead or gave directions as to the work, did not make him any the less a fellow-servant of the plaintiff. His negligence in this regard was one of the risks of the employment which the plaintiff assumed: *Kean v. Detroit C. & B. Rolling Mills*, 66 Mich. 277 (33 N. W. 395, 11 Am. St. Rep. 492); *Richmond Locomotive Works v. Ford*, 94 Va. 627 (27 S. E. 509); *Kenney v. Shaw*, 133 Mass. 501. The last case cited is in its facts very much on all fours with the one under consideration, and, having been decided before the passage of the employers' liability act by the State of Massachusetts, the principle therein announced would seem to be controlling here. In *Anderson v. Bennett*, 16 Or. 515 (19 Pac. 765, 8 Am. St. Rep. 311), which seems to be relied upon by the plaintiff, the injury occurred through the negligence of one who was charged with the performance of a duty which the master himself was required under the law to perform, and who was therefore a vice principal; while here the offending servant was a mere coemployee with the plaintiff, working with him at the time of the accident in a common service, and for whose negligence while so engaged the master is not responsible.

3. A contention is made that Nelson was incompetent, and that the defendant was guilty of negligence in retaining him in its service after knowledge of that fact. The testimony on this point tends to show that Nelson was a "fast workman," and in his haste was sometimes not as careful as some of the witnesses thought he ought to have been, but if this constituted carelessness or incompetency the plaintiff cannot complain,

because the evidence shows that he had been acquainted with Nelson for some time, had worked with him in quarries, and was entirely familiar with the manner in which he did his work, notwithstanding which he chose to continue in the service with him without objection. It is a familiar principle that if a servant continues to work with a careless or incompetent person after knowledge of that fact, making no complaint and not calling the attention of the master to the fact of such incompetency, he cannot maintain an action against his employer for an injury received through the carelessness of such servant: *Frazier v. Pennsylvania R. Co.* 38 Pa. 104 (80 Am. Dec. 467), and authorities cited; *Hatt v. Nay*, 144 Mass. 186 (10 N. E. 807); McKinney, Fel. Serv. § 88.

4. It is also claimed that the defendant was negligent in not promulgating rules by the observance of which the accident could have been avoided. There was nothing in the nature of the business in which the plaintiff was engaged at the time of the injury which made it necessary for the defendant to make and publish rules. The mere failure to adopt rules is not proof of negligence, unless it appears that the master, in the exercise of reasonable care, should have foreseen and anticipated the necessity for such precaution. It is not suggested in this case what particular rules could have been adopted that would have been likely to prevent the accident. Whether a steel or iron drill or some other means should have been used to remove the tamping from the missed hole was a mere detail of the work, depending upon the judgment of the workmen, and not a matter for the defendant to regulate by rules: *Wagner v. Portland*, 40 Or. 389 (67 Pac. 300).

Under the facts in this case, and the law applicable thereto, in our opinion there is no alternative but to reverse the judgment; and it is so ordered.

REVERSED.

Decided 7 April, 1902.

ON MOTION FOR REHEARING.

MR. CHIEF JUSTICE BEAN delivered the opinion.

Where, as in *Laning v. New York Cent. R. Co.* 49 N. Y. 521 (10 Am. Rep. 417), relied upon by the defendant, there is evidence tending to show that the servant had a reasonable excuse for remaining in the employment of the master, notwithstanding his knowledge of the incompetency of a fellow-servant, it is a question for the jury as to whether he was guilty of contributory negligence in so doing. In this case, however, there is no such evidence. No testimony whatever was given by the defendant, and that of the plaintiff shows that he had been acquainted with Nelson for several years prior to the accident, had worked with him not only in the quarry of the defendant company, but in quarries belonging to other parties, was familiar with the manner in which he did his work, and must necessarily have known of his incompetency, if he was in fact incompetent, notwithstanding which he continued to work with him without complaint. Under such circumstances, the question of defendant's liability to the plaintiff for an injury sustained in consequence of Nelson's incompetency is a question of law, and not of fact. There was no case for the jury, and the plaintiff was not entitled to have it submitted to them: 12 Am. & Eng. Ency. Law (2 ed.), 920.

The petition for rehearing is therefore denied.

REHEARING DENIED.

Argued 3 December, 1901; decided 6 January, 1902.

RUTENIC v. HAMAKAR.

[67 Pac. 192.]

PLEADING JUDGMENT OF COUNTY COURT IN PROBATE.

1. County courts being of general and superior jurisdiction in probate matters, it will be presumed that they had jurisdiction in given probate cases, and therefore their orders therein, when relied on, may be pleaded in general terms as having been made and entered, under Hill's Ann. Laws, § 86.

CONSTRUCTION OF COMPLAINT ON ADMINISTRATOR'S BOND.

2. A complaint in an action on an administrator's bond averring a hearing before the county court in "a suit for an accounting" brought against the defendant, and stating that a decree was rendered therein finding that he had a certain sum in his possession belonging to the estate, is not demurrable on the ground that the county court cannot entertain a suit for an accounting; the accounting alleged not being an equitable accounting, but the accounting required by statute of an administrator.

IDEM.

3. A complaint in an action on an administrator's bond which avers that in a suit for an accounting the county court found that he had in his possession a specified sum of money belonging to the estate, which sum he refuses to turn over to the administrator *de bonis non*, in violation of said order, does not declare on the judgment of the county court, but on a breach of the conditions of the bond: *Batley v. Wilson*, 34 Or. 186, applied.

IDEM.

4. A complaint in an action on an administrator's bond which avers that after a hearing the county court found that the administrator had in his possession a specified sum belonging to the estate, which sum he refuses to turn over to the administrator *de bonis non*, "in violation of the order of the said county court," sufficiently avers a breach of the bond by a refusal to comply with an order of the county court, it being inferable therefrom that an order to turn over the money was made.

IDEM.

5. A complaint in an action on an administrator's bond commenced May, 1899, which avers that defendant was removed as administrator in July, 1896, and that at the hearing on the settlement of his accounts in the county court in September, 1896, it was found that he had a specified sum in his possession belonging to the estate, no part of which has been paid to his successor, sufficiently avers defendant's possession of the fund at the commencement of the action; he having secured the money by virtue of his trust.

IDEM.

6. A complaint on an administrator's bond averring that an order of the county court removing the defendant required him on demand to turn over to his successor all property or money belonging to the estate, and that plaintiff duly qualified as his successor, and demanded said funds, but that defendant refuses to deliver the same, sufficiently avers breach of the condition of the bond, which provided that it should be void in case the administrator faithfully performed his trust; otherwise to remain in force.

PLEADING—EFFECT OF ANSWERING OVER.*

7. A defendant who answers over after a demurrer to a counterclaim set up by him has been sustained waives any error that may have been committed thereby: *Olds v. Cary*, 13 Or. 362, followed.

REMOVAL OF ADMINISTRATOR—EFFECT OF ON HIS AUTHORITY.

8. An administrator removed by the county court is thereby divested of all power to pay any claim against the estate, and his act in appropriating funds of the estate to the satisfaction of its indebtedness to him is a nullity.

SET-OFF TO CLAIM DUE AN ESTATE.

9. In an action by an administrator of an insolvent estate to recover a sum claimed by the estate, the defendant cannot set off a claim due from the deceased or his estate, for he would thereby obtain a preference over other creditors—though perhaps the rule may be otherwise when the estate is solvent.

ACCOUNTING BY ADMINISTRATOR—NEED OF CITATION.

10. In probate as in other legal proceedings a voluntary appearance dispenses with the need of a citation—and where an administrator answered a petition for an order requiring him to account, and appeared at the hearing on the petition, but refused to attend afterward, an order settling his accounts is conclusive on him and on his official sureties, for his voluntary appearance conferred jurisdiction.

ACCOUNTING BY ADMINISTRATOR—BASIS OF COMPUTATION.

11. For the purpose of an accounting with an administrator the county court may properly assume the correctness of the last report on file and charge the administrator and his sureties with the money there stated to be on hand: *Herren's Estate*, 40 Or. 90, approved.

PLEADING—EFFECT OF NOT ASKING FULL RELIEF.

12. The failure of a pleader to ask the exact relief or all the relief to which he may be entitled is not preclusive of any relief that the law affords—as, the fact that a complaint does not contain a demand for interest does not preclude the court from awarding interest thereon, if the facts justify it.

From Klamath: HENRY L. BENSON, Judge.

This is an action upon an administrator's bond. The complaint alleges, in effect, that W. H. Mills died about January 22, 1890, leaving an estate in Klamath County, Oregon, upon which letters of administration were issued October 15, 1894, by the county court of said county, to J. W. Hamakar, who on that day filed his bond in the penal sum of \$15,000, with his codefendants as sureties, conditioned that, if he should faithfully perform his trust as such administrator according to law, then said obligation to be void, otherwise to remain in full force, which bond was approved by the court; that, as such

*NOTE.—See *Creedy v. Joy*, 40 Or. 28, and footnote thereto.—REPORTER.

administrator, Hamakar received from the sale of real property belonging to said estate large sums of money; that said court on July 7, 1896, removed him, revoked his letters, and ordered him, upon a demand by his successor, to turn over to the latter all property and money belonging to the estate; that letters of administration thereon were issued July 20, 1896, by said court, to John F. Miller, who on that day duly qualified and became the administrator *de bonis non* of said estate; "that on the twenty-second day of September, 1896, there was a hearing before the said county court in a suit for an accounting brought by John F. Miller, as administrator of the estate of said W. H. Mills, deceased, against said J. W. Hamakar, former administrator of said estate, at which said hearing said J. W. Hamakar appeared personally, and upon such accounting the said county court found that said J. W. Hamakar had in his possession the sum of \$2,845.59 belonging to the said estate of W. H. Mills, deceased, which sum of money said Hamakar received and came into possession of as administrator of said estate, and which said sum of money, or any portion thereof, the said Hamakar has neglected and refused, and still neglects and refuses, to turn over to said John F. Miller, his successor in office, in violation of the order of the said county court;" that Miller, as such administrator, on September 25, 1896, demanded of Hamakar all the money in his possession belonging to said estate, but he refused and still neglects to pay him any part thereof; that John Gleim, one of the sureties on said bond, died about June 15, 1895; and that his estate was insolvent. The prayer of the complaint is for a judgment against the defendants, and each of them, for the sum of \$2,845.59, and for the costs and disbursements of the action.

A demurrer to the complaint on the ground that it did not state facts sufficient to constitute a cause of action having been overruled, an answer was filed, a part of which was stricken out on motion, and a demurrer to another part thereof sustained, whereupon an amended answer was filed, denying the material allegations of the complaint, and averring, in

substance, that Hamakar, as said administrator, had made no final or any settlement of his accounts, except the semiannual statement thereof filed April 7, 1896, and acted upon by the court September 22 of that year; that the order set out in the complaint was nothing more than an approval of said account, and determined no matters arising thereafter, and that Hamakar's subsequent acts as such administrator remained unadjudicated, and his accounts unsettled; that at the time Miller was appointed administrator of said estate there remained no property or assets to administer upon; and that at said time all the property remaining of said estate had been sold by Hamakar as administrator, the purchase price thereof received, and paid out as thereafter alleged. "And, for a second further answer and defense herein, the defendants allege that on the fourteenth day of November, 1891, said estate of W. H. Mills, deceased, was indebted to the defendant J. W. Hamakar in the sum of \$2,500, and that on said last-named day said defendant Hamakar duly presented to F. H. Mills, the then administrator of said estate, his claim, duly verified and in all respects according to law, and filed in said county court, and the same was allowed by said administrator; that on the tenth day of August, 1892, there was paid on said claim of said defendant Hamakar the sum of \$500; that on the twenty-first day of November, 1894, said defendant Hamakar, as alleged in the complaint, was duly appointed, qualified, and acting administrator of said Mills estate, and on said day filed in said county court his petition for an order of sale of real property belonging to said estate, showing that there were no funds in his hands as such administrator, and that said claim for \$2,000 and interest for several years, in favor of said defendant J. W. Hamakar, still remained unpaid, together with several minor claims, aggregating not to exceed \$100, which represented the entire indebtedness of said estate, and praying for such order of sale, that funds might thereby be secured to pay said claim; that thereafter such order of sale was made, finding that the allegations of said petition were true, and said petition was granted, and thereunder the realty was sold, and

a confirmation of said sale had in said county court on the eighth day of May, 1895, said order of confirmation reciting the necessity of said sale for the purpose of paying said claim; that thereafter, as alleged in the complaint, on the seventh day of July, 1896, said administrator, Hamakar, was removed by an order of said county court, from which order said defendant Hamakar appealed, which appeal is now pending in the Supreme Court of the State of Oregon; that shortly thereafter, on the fifteenth day of July, 1896, and before the appointment of the plaintiff herein as the successor of J. W. Hamakar, said J. W. Hamakar applied the sums of money received on such sale of realty in payment of said claim so allowed and sanctioned, and in conformity with the plain intent of said orders of the county court for the sale of said realty for such purpose and the order confirming such sale; that said payments accrued to the benefit of said estate in the extinguishment of said claims, that these transactions were in nowise adjudicated in the alleged hearing of September, 1896; that since said time no moneys have come into his possession or control belonging to said estate, and he is in nowise indebted thereto."

A demurrer to said second separate answer on the ground that it did not state facts sufficient to constitute a defense to the action having been sustained, a reply was filed denying the remaining allegations of new matter in the answer, whereupon a trial was had without the intervention of a jury, and from the evidence taken the court found the facts, in substance, as stated in the complaint, and, as a conclusion of law therefrom, that Miller was entitled to recover from the defendants said sum of \$2,845.59, with interest at the rate of six per cent. per annum from September 24, 1896, amounting to \$3,257.69, and, having given judgment therefor, the defendants appeal. After the appeal was perfected, Miller died, and J. C. Rutenic, who had been appointed by the county court of Klamath County administrator *de bonis non* of the estate of W. H. Mills, deceased, was upon motion, substituted as plaintiff herein.

AFFIRMED.

For appellants there was a brief over the names of *J. C. Rutenic*,* with an oral argument by *Messrs. J. W. Hamakar, in pro. per.*, and *J. A. Jeffrey* and *Geo. G. Bingham*.

For respondent there was a brief over the names of *John S. Orr, Chas. A. Cogswell* and *Geo. S. Nickerson*, with an oral argument by *Mr. Cogswell* and *Messrs. Maxwell & Hayden*.

MR. JUSTICE MOORE, after stating the facts in the foregoing language, delivered the opinion of the court.

1. It is contended by defendants' counsel that the complaint does not state facts sufficient to constitute a cause of action, and that such defect was not waived by answering over after a demurrer interposed on that ground had been overruled. It is argued that the allegation of Hamakar's removal is insufficient, because it does not aver that the county court had jurisdiction of the subject-matter or of the person of the administrator whose letters are claimed to have been revoked. The allegation thus challenged is as follows: "That on the seventh day of July, 1896, the said county court made and entered a certain order or decree removing said J. W. Hamakar as administrator of the estate of said W. H. Mills, deceased, revoking his letters of administration, and further ordering and decreeing that said J. W. Hamakar, administrator as aforesaid, shall, upon demand from his successor in office, turn over to him all property and moneys belonging to said estate." The statute, in prescribing the manner of alleging a decision of an inferior tribunal, provides that, "in pleading a judgment or other determination of a court or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made": Hill's Ann.

*NOTE.—In explanation of the fact that by the record Mr. Rutenic appears to have filed a brief against himself, it should be stated that he filed the brief on behalf of the administrator and his sureties before the death of John F. Miller, the original plaintiff herein. On the final hearing Miller's attorneys represented Rutenic, and other attorneys appeared for Hamakar.—REPORTER.

Laws, § 86. Notwithstanding this provision of the statute, it has been held that, in pleading the judgment of an inferior tribunal, the facts conferring jurisdiction must be alleged: *Dick v. Wilson*, 10 Or. 490; *Page v. Smith*, 13 Or. 410 (10 Pac. 833); *Fisher v. Kelly*, 30 Or. 1 (46 Pac. 146). This rule is evidently based upon the ground that no presumption will be indulged in favor of the jurisdiction of a court of inferior or limited power; thereby rendering it necessary, in alleging the judgment of such a court, to set forth in a pleading all the facts requisite to show that jurisdiction of the subject-matter had been conferred by a grant of sovereign power, and of the person in the manner prescribed by law: *Willits v. Walter*, 32 Or. 411 (52 Pac. 24). In a judgment rendered by a court of general and superior jurisdiction, however, every fact necessary to confer jurisdiction will be presumed in order to support the validity of the judgment: *Bruckman v. Taussig*, 7 Colo. 561 (5 Pac. 152); *Pennington v. Gibson*, 59 U. S. (16 How.) 65; *Springsteene v. Gillett*, 30 Hun, 260; *Spaulding v. Baldwin*, 31 Ind. 376; *Hansford v. Van Auken*, 79 Ind. 302; *Lathrop v. Stuart*, 5 McLean, 167 (Fed. Cas. No. 8,113); *Holmes v. Campbell*, 12 Minn. 221; *Rogers v. Odell*, 39 N. H. 452; *Wilbur v. Abbot*, 58 N. H. 272. The county court, in probate matters, is a court of general and superior jurisdiction [*Tustin v. Gaunt*, 4 Or. 305; *Farley v. Parker*, 6 Or. 105 (25 Am. Rep. 504); *Monastes v. Catlin*, 6 Or. 119]; and, as it is unnecessary to allege a fact which the law will presume [Bliss, Code Pl. (3 ed.) § 175; Boone, Code Pl. § 11; Chit. Pl. *221], the plaintiff was not required to allege that said court had secured jurisdiction of the person and subject-matter, so that the complaint is not vulnerable to the objection that it does not state facts sufficient to constitute a cause of action, notwithstanding it failed to allege that the order removing the administrator was "duly" given or made; such qualifying word being required only in pleading the determination of a court or officer of special jurisdiction: Hill's Ann. Laws, § 86.

2. It is insisted that the county court is without authority to entertain a suit for an accounting; that the personal ap-

pearance of Hamakar therein as alleged in the complaint did not confer upon it jurisdiction of the subject-matter, and hence the complaint fails to state facts sufficient to constitute a cause of action. It is the duty of every executor or administrator, in April and October of each year, until the administration is completed and he is discharged from his trust to render an account, verified by his oath, and file the same with the clerk, showing the amount of money received and expended by him, etc.: Hill's Ann. Laws, § 1170, as amended February 25, 1895 (Laws, 1895, p. 89). If he fails to comply with this requirement, he may be cited to appear before the county court and ordered to file an account; and if he neglect to appear when cited, or to file the account as required, he may be punished for a contempt: Hill's Ann. Laws, § 1171. The county court is a court of record, having general jurisdiction to be defined, limited, and regulated by law: Const. Or. Art. VII, § 12. Such court has exclusive original jurisdiction to direct and control the conduct and to settle the accounts of executors, administrators, and guardians: Hill's Ann. Laws, § 895, subd. 3. The mode of proceeding in the administration of estates is in the nature of a suit in equity, as distinguished from an action at law; the county court exercising its power by means of a citation to the party, and securing jurisdiction of the subject-matter by means of a verified petition, enforcing its determination by orders and decrees: Hill's Ann. Laws, § 1078, subds. 1, 2, 4; *Wright v. Edwards*, 10 Or. 298, 301; *Plunkett's Estate*, 33 Or. 414 (54 Pac. 152). The county court is not, in the strict sense of the term, a court of equity, even in probate matters [*Richardson's Guardianship*, 39 Or. 246 (64 Pac. 390)]; but the proceedings therein in the administration of estates are so analogous thereto that the defendant must have understood what was intended by the averment in the complaint that, on the hearing in a suit for an accounting brought by Miller against him, the county court found that he had in his possession the sum of \$2,845.59 belonging to said estate. If the allegation were not so understood, the remedy

was by motion to make the complaint more definite and certain.

3. It is maintained that, if Miller's right is based on the alleged judgment of the county court, the complaint fails to state facts sufficient to constitute a cause of action, because it does not aver that the judgment has not been paid, or that it is still in force and effect, and that, if the right is founded on an alleged breach of the condition of the bond, the complaint is subject to the same objection, because it does not aver that the principal has in his possession any property or money belonging to said estate. In *Bailey v. Wilson*, 34 Or. 186 (55 Pac. 973), it was held that a complaint upon an insurance agent's bond, alleging that the principal had received various sums which he had failed to pay over, and that upon an accounting and settlement with reference thereto a specified sum was ascertained and determined to be due, which the principal promised and agreed to pay, does not declare upon an account stated, but upon a claim for damages resulting from a breach of the bond. The rule thus announced must control this case, which is not an action on a judgment, but on an alleged breach of the conditions of a bond.

4. The complaint alleges that the county court having found that Hamakar had in his possession the sum of \$2,845.59, Miller on September 25, 1896, demanded of him all the money in his possession belonging to said estate, but he refused to comply therewith, and still neglects to pay over to him any part thereof, in violation of the order of said court. In *Judge of Probate v. Couch*, 59 N. H. 39, it was held that, to maintain an action on a probate bond, it was necessary to aver and prove a breach of the bond, by a neglect or refusal to comply with the order of the probate court to account. The complaint in the case at bar does not allege that Hamakar was required by order of the county court to pay to Miller said sum of money; but, it having averred that his refusal to do so violated the order of said court, it is reasonably inferable from the complaint that such order was made.

5. It is maintained that the complaint fails to state facts

sufficient to constitute a cause of action, because it does not allege that at the commencement of this action either of the defendants had in his possession or under his control any property or money belonging to the estate of W. H. Mills, deceased. This action having been commenced May 19, 1899, it is alleged in the complaint that Hamakar was removed as administrator July 7, 1896, and that at the hearing in the county court September 22, 1896, it was found that he had in his possession the sum of \$2,845.59, no part of which had been paid over to Miller as his successor. Hamakar secured this money by virtue of his trust, in view of which we think the complaint shows that it was in his possession at the time this action was instituted.

6. It is also contended that the complaint fails to state facts sufficient to constitute a cause of action, because it does not clearly allege a breach of the bond. The conditions of that obligation are that it should be void if Hamakar faithfully performed his trust as administrator according to law. The county court having removed him as administrator, his authority to act for the estate was withdrawn: *Knight v. Hamaker*, 33 Or. 154 (54 Pac. 277, 659). The power to remove an executor or administrator conferred by the statute (Hill's Ann. Laws, § 1094), necessarily carries with it, as an incident thereof, the authority to require him to render an account, and to pay over all moneys in his hands and to deliver all property in his possession belonging to the estate to his successor; and any failure to comply therewith is a violation of the provisions of law, and a breach of the conditions of his bond. The complaint alleges that the order removing Hamakar required him, upon demand, to turn over to his successor all property and moneys belonging to said estate; that Miller was appointed as such successor, and, having duly qualified as administrator, he demanded of Hamakar all the money in his possession belonging to said estate, but he refused and still neglects to pay any part thereof. This sufficiently alleges a breach of the condition of the bond, and shows that the complaint states facts sufficient to constitute a cause of action.

7. It is contended that in an action on a bond, to recover damages for a breach thereof, the principal and sureties may interpose as a defense thereto a counterclaim in favor of the principal, and hence the court erred in sustaining a demurrer to the third separate defense in the original answer, setting up a counterclaim. Whatever the rule of law may be in respect to the defense insisted upon, it can have no application to this case, for the defendants, having answered over after the demurrer was sustained, waived any error that may have been committed thereby: *Wells v. Applegate*, 12 Or. 208 (6 Pac. 770); *Olds v. Cary*, 13 Or. 362 (10 Pac. 786).

8. It is maintained that the court erred in sustaining a demurrer to the second separate defense in the amended answer. It will be remembered that it was there alleged that Hamakar's claim of \$2,500 against said estate having been allowed, upon which he was paid the sum of \$500, he was thereafter appointed administrator, and secured an order to sell the real property of the estate, upon his petition therefor, showing that it was indebted to him in said sum, with interest, and also owed several minor demands, not exceeding \$100, which represented the entire indebtedness of the estate, in pursuance of which he sold said property and the sale was confirmed; that on July 7, 1896, he was removed as administrator, and eight days thereafter applied the money received on account of said sale in payment of his claim, in the extinguishment of which the estate was benefited; that such application of the money was not credited to him, nor was the payment thereof adjudicated in the alleged settlement made by the county court September 22, 1896; and that since said sale no money has come into his hands belonging to said estate, nor is he indebted thereto. It will be seen by these averments that Hamakar, after his removal, applied the money arising from said sale to the payment of his own claim, and did not pay any other claims. He alleges that he is not indebted to the estate, though the money received from said sale, as will hereinafter be shown, was more than sufficient to satisfy his claim against the estate. When his letters of administration were revoked,

his authority to act for the estate terminated, and he was divested of all power to pay any claim against it. When he was appointed administrator he became the agent of the county court for the purpose of executing the trust reposed in him, thereby making it obligatory on him to obey all its lawful orders made in administering the estate. His authority being thus dependent upon the sanction of the county court, it follows that when he was removed, and his letters revoked, his power ceased, and any act thereafter performed by him in attempting to administer upon the estate was an absolute nullity: *Levy v. Riley*, 4 Or. 392.

9. If it be assumed that the averments of new matter in the amended answer, to which the demurrer was directed, and which, in substance, had been averred in the original answer as a counterclaim, can be treated as constituting a defense, we do not think the allegations are sufficient for that purpose. A part of the amended answer, not challenged by the demurrer, contained the following concession: "But admit that said Hamakar refuses and neglects to pay over to said John F. Miller, administrator as aforesaid, and plaintiff herein, said sum of \$2,845.59, or any part thereof." This admission may be regarded as a correct statement of the sum received by Hamakar on account of the sale of the real property belonging to the estate. The interest on \$2,500 at eight per cent. from November 14, 1891, when Hamakar's claim for that sum was allowed, to August 10, 1892, when he was paid \$500, is the sum of \$147.77, which added to the principal, makes \$2,647.77, and, subtracting the payment, leaves \$2,147.77. The interest on the new principal, at the same rate, from the date of such payment to July 15, 1896, when it is alleged that Hamakar applied the money in his hands to the payment of his claim, is \$675.75, and the amount then due him was \$2,823.02, after paying which from the money received from the sale of the land he had remaining only \$22.57, not including any sum on account of the expenses incurred in the administration of the estate; thus showing that the estate was insolvent, and Hamakar not entitled, in any event, to the payment of his claim

in full. In an action by an executor or administrator of a solvent estate, it has been held that the defendant may set off any claim that he may have had against the testator or intestate: *Hicks v. National Bank of N. L.* 168 Pa. St. 638 (32 Atl. 63); *Steinmeyer v. Ewalt St. Bridge Co.* 189 Pa. St. 145 (42 Atl. 132). Such a rule cannot be invoked in case of an insolvent estate, however, for to permit it to have that effect would disturb the ratable distribution of the fund arising from the sale of the decedent's property to which each of his creditors is entitled. For these reasons no error was committed in sustaining the demurrer.

10. It is contended that the court erred in admitting in evidence a transcript of the alleged decree of the county court settling Hamakar's account, and finding that he had in his possession the sum of \$2,845.59, belonging to said estate, which he refused to turn over to his successor. It is argued that in a suit on an administrator's bond no recovery can be had unless it is shown that the administrator was cited to render an account; citing *Nelson v. Jaques*, 1 Me. 139; *Court of Probate v. Eddy*, 8 R. I. 339. The decree in question recites that Hamakar filed an answer to Miller's petition for an order requiring him to account, appeared in person in open court at the hearing thereon, but declined further to attend the trial, whereupon the court, having taken testimony, made the finding of which the appellants complain. The object of a citation in probate proceedings is to secure the attendance of parties, but, if this is accomplished by a voluntary appearance, the object of the statute is fully subserved. In *Adams v. Petrain*, 11 Or. 304 (3 Pac. 163), it was held that no action can be maintained on an administrator's bond until after the settlement of his accounts in the county court, and such is the effect of the decision to which our attention has been called: *Gilbert v. Duncan*, 65 Me. 469. Hamakar having declined to take any part in the examination of his accounts, it was the duty of the court to ascertain the condition thereof as best it could.

11. For the purpose of this duty his report filed April 7, 1896, showing that he had in his possession on that day money

belonging to the estate in the sum of \$2,845.59, formed the basis of the court's finding. In *Herren's Estate*, 40 Or. 90 (66 Pac. 688)—a proceeding by an administrator *de bonis non* against the representative and sureties of a deceased administrator to compel an accounting,—it appeared from the last report of the prior administrator that he had in his hands a given sum of money; and it was held that the burden of proof was on the defendants to show the proper administration of such fund, and that the court's finding thereon furnished *prima facie* evidence against the sureties as to the correctness thereof. To the same effect is *Bellinger v. Thompson*, 26 Or. 320, 347 (37 Pac. 714, 40 Pac. 229), and *Thompson v. Dekum*, 32 Or. 506 (52 Pac. 517, 755).

12. The prayer for judgment did not include a demand for interest, but the court awarded therefor the sum of \$412.10, and it is claimed that error was thereby committed. "The failure to ask relief to which it is apparent the party is entitled," say the editors of the *Encyclopedia of Pleading and Practice* (Vol. XVI, p. 795*b*), "will not, as a general rule, have the effect to deprive him of the relief to which he is entitled in fact; and especially is this so where the defendant has appeared and answered." In *Carpenter v. Sheldon*, 22 Ind. 259, the complaint prayed judgment for the sum due at the first term of the court after the suit was instituted, but the judgment was not rendered until a subsequent term, and then given for the sum originally demanded, with accrued interest; and it was held that the complaint would be deemed amended so as to demand judgment for the sum awarded. Hamakar having retained this money, which came into his hands by virtue of his trust, the estate was entitled to interest thereon; and the defendants having answered the complaint, the court was authorized to give judgment for the interest: *Jones v. Butler*, 30 Barb. 641; *Hopkins v. Lane*, 2 Hun. 38; *Marquat v. Marquat*, 12 N. Y. 336.

Other errors are assigned, but, not deeming them important, the judgment is affirmed.

AFFIRMED.

Argued 16 December, 1901; decided 6 January, 1902.

VENABLE v. POLICE COMMISSIONERS.

[67 Pac. 203.]

NATURE OF QUESTIONS TO BE SETTLED BY WRIT OF REVIEW.

1. On a writ of review only law questions arising on the record can be determined—no testimony can be received.

MUNICIPALITY—POWER TO REMOVE POLICE OFFICER.

2. Under a city charter providing for a board of police commissioners who shall perform the executive functions of the city in the organization and management of the police department, and requiring that all appointees on the force shall hold their offices during good behavior, and that no officer shall be removed on political grounds, or for any reason except inefficiency, misconduct, insubordination, or violation of law, after a fair trial, the police commission has the power to reduce the size of the force to keep the expenditures within the estimated revenues, and to summarily remove officers for that purpose, the provisions in reference to trial not applying to such removals.

PUBLIC EMPLOYEES—IMPLIED POWER OF REMOVAL.

3. Where a public board, as a municipal police or fire board, is given the power to appoint employees, there goes with it an implied power to remove them, unless there is a limitation elsewhere in the law creating the board.

REDUCING POLICE FORCE BY DISMISSALS.

4. The record of a municipal police commission showed that on a certain day the commission proceeded to organize the department by the appointment of fifty-six men on the police force, including plaintiff, which was the only order creating the offices which such appointees should fill. Thereafter the plaintiff and nine other officers were removed; the record reciting that they were dismissed from service, though they had performed their duties, there being no funds for their payment. *Held* that, as the offices filled by such appointees were created merely by their appointment, the later entry showing their dismissal was a reduction of the police force by the abolition of the offices held by such appointees, and was not a mere dismissal of the officers without trial.

REMOVAL OF POLICEMEN FOR POLITICAL REASONS.

5. Ten officers were discharged on June 23, which was shortly after a municipal election, the order of discharge reciting that they had performed their duties, but were removed by the commission for want of funds. On June 30 one of the removed officers was appointed special policeman, and on August 2 four others were appointed as members of the force, and on September 2 two others were reappointed. There were no appointments made in place of the other officers removed. *Held*, insufficient to show that any of the officers were removed for political reasons.

Mr. Chief Justice BEAN dissents.

From Multnomah: ALFRED F. SEARS, JR., JOHN B. CLELAND and MELVIN C. GEORGE, Judges, in joint session.

Writ of review by Charles Venable against the Board of

Police Commissioners of the City of Portland to determine the validity of his removal from the police force. From a judgment in favor of plaintiff, defendant appeals. The judgment was rendered by Judges SEARS and CLELAND, Judge GEORGE dissenting. REVERSED.

For appellant there was a brief over the names of *Joel M. Long*, City Attorney, and *Ralph R. Duniway*, with an oral argument by *Mr. Long*.

For respondent there was a brief over the names of *Gammans & Malarkey* and *John F. Logan*, with an oral argument by *Mr. Logan* and *Mr. Dan J. Malarkey*.

MR. JUSTICE WOLVERTON delivered the opinion.

This is a special proceeding to review the action of the board of police commissioners, whereby the plaintiff was relieved from the office of regular policeman of the City of Portland. The plaintiff was appointed November 3, 1899, and continued to discharge the duties of his appointment until June 23, 1900, when he was dismissed by an order of the board, made and entered at a regular meeting thereof, without notice or charges; and it is alleged that by reason thereof the board has exceeded its jurisdiction, and exercised its judicial functions erroneously. The secretary of the board returned the writ with a transcript of the proceedings had relative to plaintiff's appointment and dismissal, which is, in brief, as follows:

“November 1, 1898.

The board met. * * On motion of Mr. Cohen, J. L. Wells was appointed humane officer.”

“November 3, 1899.

Pursuant to adjournment, the board met. * * Mr. Bates moved that the board proceed to organize the department in accordance with the charter by the appointment of the following named men to the police force, which was carried.” Those appointed were O. P. Church, Fred Hallett, W. O. Stitt, H. A. Parker, P. Murray, C. L. Du Bois, C. Venable, M. Waller, J. M. Harkleroad, E. W. Cole, and forty-seven others.

“June 23, 1900.

Adjourned meeting of the board. * * The following members of the police department were dismissed from service, there being no funds for their payment; and the commissioners desire to state that, while the officers performed their duties, the action of Mr. Greenleaf, the assessor, in reducing the assessment, made it imperative. * * To take effect June 30, 1900.” Those dismissed were J. C. Wells, Charles Venable, the plaintiff, and other persons above-named, except O. P. Church.

“July 30, 1900.

The board met. * * On motion of Commissioner Bates, O. P. Church was appointed special policeman, *vice* Jack Roberts.”

“August 2, 1900.

A special meeting of the board. * * On motion of Commissioner McLauchlan, H. A. Parker and E. W. Cole were appointed policemen. On motion of Commissioner McLauchlan, John F. Kerrigan and Frank J. Snow were appointed detectives.”

“September 3, 1900.

The chief of police reported having appointed C. L. Du Bois and J. M. Harkleroad regular officers. On motion, the appointments were ratified.”

“November 5, 1900.

The board had its regular monthly meeting. * * The chief of police reported having reinstated O. P. Church as a regular policeman on October 25, 1900, and on motion his action was ratified.”

“November 5.

* * On motion of Commissioner Rankin, Joe Reising was appointed a regular policeman, to be detailed as humane officer; the appointment to date from November 15, 1900. He served fifty-five days and resigned. Has received no money. Mr. Reising was selected by the Humane Society with the understanding that if the council did not pay his salary, which

the commissioners said would be very uncertain, the society itself would supply it."

The trial court reversed the order dismissing the plaintiff from service, and directed his reinstatement, from which judgment the board appeals.

1. The plaintiff's contention is that by the act of the board appointing him and others regular policemen they were constituted officers, and that their tenure of office was during good behavior; that they could not be removed for any cause or purpose whatsoever, except for inefficiency, misconduct, insubordination, or violation of law; and that the dismissals were made to subserve political purposes, contrary to the direct inhibition of the charter. Upon the other hand, it is maintained that the board was vested with ample power to so manage and regulate the department as to adapt it to the exigencies of the service, and that it was authorized to reduce the police force upon economical grounds, being charged with the duty of keeping the expenses of the department within the appropriations or funds available therefor, and that the dismissal of plaintiff, with others, was in pursuance of that authority, and not for political reasons. The proceeding being by writ of review, the question must be resolved by the record, as one of law, and no extraneous facts or evidence *aliunde* can be taken into account.

2. The police commissioners are by the charter given plenary power pertaining to the organization, management, and control of the police department. In this respect they stand in the place and stead of the common council, as they are clothed with all the executive functions of the city pertaining thereto. They are authorized to adopt rules and regulations for receiving and hearing complaints against members of the police force; for their removal, suspension, or forfeiture of wages on account of misconduct or negligence in the discharge of their duties: Sections 68, 69, 70, Portland City Charter, 1898. Beyond this, their functions require that, from an economical standpoint, they shall so manage and conduct the affairs pertaining to the department as to keep the expenses

within the revenues appropriated and available for that purpose: Section 32, subd. 1, and sections 51, 71, 217, Portland City Charter, 1898; *Gadsby v. Portland*, 38 Or. 135 (63 Pac. 14). The revenues are fixed by the charter, and, after an assessment is made, the amount available may be readily ascertained. In view of these powers and functions imposed upon the board, it was declared that all appointments made thereby should continue during good behavior, and that no officer or member of the department should be removed or reduced in rank or pay upon political grounds, or for any reason except inefficiency, misconduct, insubordination, or violation of law, after a fair trial upon complaint regularly preferred, and reasonable notice: Sections 99-101. These latter regulations are restrictions upon the powers previously accorded, and are to be construed as limiting the power of removal for cause to those several reasons enumerated, but the power to so administer the affairs of the department as to keep the expenditures within the estimated revenues is not thereby restrained or circumscribed. Having the power to organize the police force in the first instance the commissioners have the power to increase or reduce it as the exigencies and proper management may require; and therefore, if the anticipated revenues are insufficient to meet the requirements of an efficient service, they may reduce the force so that the expenditures will not exceed the appropriations, if practicable.

This is a view taken of a like situation in New York, and seems reasonable and sound. It was there enacted that "no regular clerk or head of a bureau shall be removed until he has been informed of the cause of the proposed removal, and has been allowed an opportunity of making an explanation, and in every case of removal, the true grounds thereof shall be forthwith entered upon the records of the department or board," the object of which legislation was declared to be to prevent removals, except for cause, and then only after an opportunity to be heard. It was adjudged that such enactment had no application to the case where a clerkship was abrogated, because there was no further need for the services, or for the lack of

available funds with which to meet expenses. In another case it was said that the provision has no application to a case where the incumbent was dismissed for want of funds, or in order to reduce expenses: *Lethbridge v. City of New York*, 133 N. Y. 232, 237 (30 N. E. 975); *Langdon v. Mayor of New York*, 92 N. Y. 427; *People ex rel. v. Board of Fire Com'rs*, 72 N. Y. 445; *Moore v. State ex rel.* 54 Neb. 486 (74 N. W. 823).

3. It is urged that the board is not accorded the power of removal by way of distinguishing some of the cases where it appears that such a power was expressly given by statute. But the authority is implied from the power of appointment, where the tenure of the office is not otherwise defined, unless restrained or limited by some other provision. We quote the language of the cases: "The power to appoint to office or place where the term and tenure are not defined necessarily carries with it the power of removal": *People ex rel. v. Board of Fire Com'rs*, 73 N. Y. 437, 441. "In the absence of restraints imposed by the constitution or by statute, the power of appointment implies the power of removal, when no definite term is attached to the office by law": *People ex rel. v. Lathrop*, 142 N. Y. 113, 116 (36 N. E. 805). "With respect to the tenure or duration of public employment such as the relator had at the time of his dismissal (a member of the park police of the City of New York), the general rule is that where the power of appointment is conferred in general terms and without restriction, the power of removal, in the discretion and at the will of the appointing power, is implied, and always exists, unless restrained and limited by some other provision of law": *People ex rel. v. Robb*, 126 N. Y. 180, 182 (27 N. E. 267). So that we need not look further for the power of removal. It exists by implication, unless restrained by some other provision of the charter.

1. In November, 1898, J. L. Wells was appointed humane officer; and on the third of November, 1899, the board proceeded to reorganize the department by appointing fifty-six men upon the police force, among whom were O. P. Church and the plaintiff. This is apparently all there was of the or-

ganization,—the simple appointment of these men as regular policemen. The record of the board of June 23, 1900, is to this effect: “The following members of the police department were dismissed from service, there being no funds for their payment; and the commissioners desire to state that, while the officers performed their duties, the action of Mr. Greenleaf, the assessor, in reducing the assessment, made it imperative.” Then follow the names of the persons dismissed, among whom were the plaintiff, J. L. Wells, and eight others. So it appears that the dismissal or removal from service of these men was no more informal than their appointment. Now, if this was a reduction of the police force, and not a sheer removal of the incumbents, and such reduction was for economical reasons, it must be considered, under the authorities, legitimate and valid; and this depends upon whether the mode adopted for such reduction was regular and competent for the purpose, and upon the construction to be given the language of the board in making the removals as to its intention in the premises. The only creation there was of any office was the appointment of these men to serve in the capacity of regular policemen. The board had not, so far as the record shows, previously adopted any rule or regulation, as it is probable it was empowered to do, creating or establishing any office by the title of regular policeman, or designating the number that should constitute the police force. So there were no offices to be filled at the time of the appointment, and none exist now, except as the appointments authorize the incumbents to assume the title and discharge the duties pertaining thereto. As the method of creating the offices was by the appointment of the officers solely, the removal of the incumbents was effective for their abrogation, so that the police force as thus organized was reduced by the number of regular policemen dismissed from service. No more formal or particular method could be required to be observed in the reduction of the force than in its establishment or increase.

5. Was it the purpose of the board in dismissing these men from service to reduce the force because of the lack of suffi-

cient funds to warrant their retention, or, as charged by plaintiff, did it remove them for political reasons? The presumption always obtains that public officials and boards indued with public functions have acted and will act in the discharge of their duties honestly and in entire good faith. So we must assume that the board has discharged its duties uprightly and with good and lawful intent in the present instance, unless the contrary appears. The form of the order, reciting that the members were dismissed from service, with the declaration that they had performed their duties, must be interpreted to mean that they were relieved for no reasons detrimental to their standing as officers. But the reason stated for relieving them is that there were no funds for their payment, and this was sufficient, if true and made *bona fide*. As to the truth of the assertion, there is absolutely nothing in the record to controvert it. The fact that the order was made soon after the general election is a circumstance in support of plaintiff's position, but it is clearly not sufficient within itself to impute bad faith. It is asserted, however, that other men were subsequently appointed in the stead of those dismissed, and that this indicates unmistakably the evil intent with which the board acted in the first instance. Now, if we are permitted in this kind of a proceeding to take into consideration the subsequent records in connection with the original order, for the purpose of ascertaining with what intent the latter was made,—a proposition about which there is some doubt,—we find that on July 30, a month afterwards, O. P. Church was appointed as a special policeman, *vice* Jack Roberts. He is not complaining, however, and the incident throws no light upon the original order of dismissal. On August 2, Parker and Cole were reappointed regular policemen, and John F. Kerrigan and Frank J. Snow were appointed detectives. No inference can be drawn from the fact of reappointing Parker and Cole that they and others were relieved for political reasons. Indeed, the reasonable deduction would be quite to the contrary. Kerrigan and Snow were appointed to a different service.

Whether the position is one of higher grade than a regular policeman, and should have been made from the regular force, is not disclosed, but the fact of their appointment in no way impeaches the good faith of plaintiff's dismissal. On September 2, Du Bois and Harkleroad were reappointed; and on November 5, Church was reinstated, and Joe Reising appointed as a regular policeman, to be detailed as humane officer at the instance of the Humane Society, and has received no pay from the department for his services. This constitutes the whole record. Of the ten dismissed from service, four have been reinstated, two are not complaining, while four are prosecuting writs of review for their reinstatement. Of these latter, none others have succeeded to their posts of duty, so it cannot be said that they have been displaced to make room for men more congenial politically with the board, and it is difficult, if not inimical to reasonable deduction, to extract from the record, in the face of the presumption of good faith primarily to be accorded the acts of the board, that these dismissals were made for political reasons.

True, it was the indubitable purpose of the legislature to extend civil service rules to the police and fire departments of the City of Portland,—a commendable and meritorious policy to adopt,—and the charter provisions relative thereto should be vigorously and scrupulously observed and executed; but it has never been the purpose of civil service reform to hamper or cripple the public service, so that it may not be conducted for the best interest of the state or municipality concerned. The legislature has not promulgated any specific rules for the organization, management, and control of the police department, nor has it designated the number of offices to be established, the grades thereof, or pointed out the method for the selection of special officers for dismissal where a reduction of the service is contemplated; and we are not advised of any that the members of the police commission have adopted for the regulation and government of these matters. Perhaps they have adopted none, or possibly have failed in this respect to exercise the power accorded, or to observe the rea-

sonable mandate of the charter; but unless we can say that they have exceeded their jurisdiction, or exercised their judicial functions erroneously, to the injury of the plaintiff, we are powerless to give relief in this kind of a proceeding.

The record does not disclose an excess of authority, and hence the judgment of the circuit court will be reversed, and the cause will be remanded, with directions to dismiss the writ, and it is so ordered.

MR. CHIEF JUSTICE BEAN, dissenting.

As the charter does not specify the number of officers or members of the police force, but makes it the duty of the board of police commissioners, with the funds derived from an annual tax of not to exceed one and three-quarter mills (Laws, 1898, p. 109, § 32; Laws, 1898, p. 180, § 217), to organize, govern, and conduct a police force, with a chief, one or more captains, detectives, etc., and "a suitable force of regular policemen" (Laws, 1898, p. 125, § 68; Laws, 1898, p. 127, § 70), I concur in the view that it is within the power of the board to reduce the force whenever the public revenues demand. I think, however, this should be done by direct resolution or order abrogating the extra offices, and not by the mere removal of the officers. As I read the charter, the board is absolutely prohibited from removing a policeman, except for certain enumerated causes, which do not include a want of funds: Laws, 1898, p. 139, § 101. So long as the office exists, the appointee is entitled to hold it, unless removed in the manner provided in the charter, and for the causes specified. The record of the police board recites that the plaintiff and other policemen named were "dismissed from service," and I doubt whether it can be properly held to show an intention to reduce the force or abrogate the offices they held, especially in view of the subsequent action of the board in reappointing some of the persons dismissed, and in appointing others, without an order increasing the force.

REVERSED.

Argued 20 February; decided 17 March, 1902.

FERGUSON v. BYERS.

[67 Pac. 1115, 69 Pac. 32.]

SUFFICIENCY OF PETITION FOR WRIT OF REVIEW.

1. Under a statute such as Hill's Ann. Laws, § 584, which requires a petition for a writ to review the decision of an inferior tribunal to describe with convenient certainty the judgment to be reviewed, and to set forth the alleged errors, and section 585, which provides that the writ shall issue when the inferior court appears to have exercised its functions erroneously, or to have exceeded its jurisdiction to the injury of some substantial right of the petitioner, it is not necessary that the petition should set forth distinctly that the petitioner has been injured, since that is a mere conclusion from the statement of the particulars in which the lower court erred.

JURISDICTION OF JUSTICE'S COURT—AMOUNT OF CLAIM.

2. The jurisdiction of a justice's court in Oregon is to be determined by the *ad damnum* clause of the complaint, and not by the amount of the judgment, and if the complaint prays for more than the jurisdictional amount the court is without jurisdiction; and further, where the complaint prays for a sum in excess of the jurisdictional amount, the remission of the excess at the time of trial will not confer jurisdiction: *Troy v. Hallgarth*, 35 Or. 162, applied.

APPEAL—DEFINITENESS OF OBJECTIONS TO COST BILL.

3. Under Section 556 of Hill's Ann. Laws, objection to a cost bill should be sufficiently definite to apprise the adverse party of the particulars wherein the disputed items are claimed to be unwarranted, and this rule is sufficiently complied with by a series of objections stating that the alleged cost of the transcript is excessive because it was for unnecessary documents, and that the abstract contains a certain amount of irrelevant matter, and that the cost of printing the brief, exclusive of repetitions and irrelevant matter, would not exceed a stated amount.

COST OF APPEAL—UNNECESSARY MATTER IN TRANSCRIPT.*

4. Under Rules 1 and 2 of the supreme court (35 Or. 587, 588), a transcript should contain only the papers specified therein, and where other papers have been copied into the record the charge for such copying should not be allowed in the cost bill; as, for example, the losing party should not be obliged to pay for the repetition of the title of the case, the repetition of the cost bill, the file marks on the papers, the signatures of officers and attorneys, and such irrelevant matter.

COST OF PRINTING UNNECESSARY MATTER IN ABSTRACTS.**

5. Parties who include unnecessary matter in their abstracts, or who un-

*NOTE.—The expense of preparing matter included in the transcript contrary to the limitation of Rule 2 cannot be taxed, under Rule 24: *Albert v. Salem*, 39 Or. 466 (66 Pac. 233); *Hammer v. Downing*, 39 Or. 505 (67 Pac. 30).—REPORTER.

**NOTE.—The habit of printing in the abstract matter not reasonably designed to present the questions reserved for consideration on the appeal is a departure from both the terms and spirit of Rule 4, relating to the prepara-

necessarily repeat papers, and especially long indorsements and file marks, should not be allowed the expense of printing them, under Rules 4 and 24 (35 Or. 587, 591, 603).

COST OF UNNECESSARY MATTER IN BRIEF.

6. Parties printing briefs in the supreme court should not reproduce the matter required by the rules to be in the abstract, and where they do so the expense thereof should not be allowed as part of the costs.

COSTS ON APPEAL—CLERICAL EXPENSE.

7. A successful party in the supreme court is not entitled to recover as an item of costs the expense of copying paper used in preparing the case on appeal.

From Polk: REUBEN P. BOISE, Judge.

This is a proceeding by a writ to review the judgment of a justice's court, and is on appeal from a judgment of the circuit court dismissing the writ. REVERSED.

For appellant there was a brief and an oral argument by *Mr. Frank Holmes*.

For respondent there was a brief and an oral argument by *Messrs. B. F. Bonham and Carey F. Martin*.

MR. JUSTICE MOORE delivered the opinion.

This is a proceeding to review a judgment of an inferior court. The defendant, in an action against the plaintiff in the justice's court of District No. 5, Polk County, alleged in her complaint that she was the owner and entitled to the possession of a bay mare valued at \$100, a colt at \$25, a bay horse at \$100, a buggy at \$20, and a set of harness at \$4, which the plaintiff attached in said county in an action wherein C. L. Pearce was plaintiff and J. A. Byers defendant; that such seizure was wrongful, and by reason thereof she was damaged in the sum of \$25, and prayed for the return of the property, or the value thereof in case a delivery could not be had, and the sum of \$25 damages. A summons was issued, directed to

tion of abstracts, and the cost of such extra matter will not be allowed, under Rule 23, if seasonably objected to: *Young v. State*, 36 Or. 417 (60 Pac. 711); *Hammer v. Downing*, 39 Or. 505 (67 Pac. 30).—REPORTER.

the constable, commanding him to summon the plaintiff to appear at a time and place specified to answer said complaint. The return indorsed on the summons shows that the constable, not being able, after diligent search and inquiry, to find the plaintiff in said county, substituted service thereof was made upon his wife at his residence and usual place of abode. The plaintiff's counsel having appeared specially for that purpose, moved the court to quash the service of the summons on the ground that the copy thereof was not delivered at his residence and usual place of abode; but the motion was overruled, and plaintiff refused to further plead or answer, whereupon judgment was rendered against him for the possession of the property or for the sum of \$249, the value thereof, the defendant's counsel waiving all damages for the alleged wrongful taking and detention. The petition by the plaintiff herein for the writ of review sets forth the errors alleged to have been committed by the justice's court, among which it is averred that it did not have jurisdiction of the subject-matter of the action. The writ having been issued by the circuit court for said county, the return thereto sets forth the facts in substance as hereinbefore stated, and, a trial being had, the writ was dismissed and the plaintiff appeals to this court.

1. The question to be considered is whether the judgment of the justice's court is void in consequence of a want of jurisdiction. As a preliminary matter, however, it is insisted by defendant's counsel that the petition for the writ of review does not state facts sufficient to entitle the plaintiff to the benefit of this special remedy, because it is not alleged therein that the justice's court exercised its functions erroneously to the injury of any substantial right of the plaintiff. The writ of review under our system of procedure is analogous to the common-law remedy by certiorari: Hill's Ann. Laws, § 582; *Dayton v. Board of Equaliz.* 33 Or. 131 (50 Pac. 1009). The statute provides, in effect, that it shall be allowed by the circuit or county courts, or by a judge thereof, upon the petition of the plaintiff, describing the decision sought to be reviewed, and setting forth the errors alleged to have been committed

therein: Hill's Ann. Laws, § 584; *Southern Oregon Co. v. Coos County*, 30 Or. 250 (47 Pac. 852). Before allowing the writ of review, the court ought to be reasonably satisfied, from an inspection of the petition, that the inferior court, officer, or tribunal, in the exercise of judicial functions, appears to have employed its or his power erroneously, or to have exceeded its or his jurisdiction, to the injury of some substantial right of the plaintiff: Hill's Ann. Laws, § 585. The petition in the case at bar described the judgment in the justice's court sought to be reviewed, and specified with particularity the errors alleged to have been committed; and, the plaintiff having thus complied with the necessary statutory requirements, the petition stated facts sufficient to entitle him to the relief demanded, without alleging therein that the decision resulted in injury to any of his substantial rights, which is a mere legal conclusion, to be deduced by the court from the averments of fact.

2. Considering the appeal on its merits, the statute limiting the amount in controversy is as follows: "A justice's court has jurisdiction, but not exclusive, of the following actions: * * * (2) For the recovery of specific personal property, when the value of the property claimed and the damages for the detention do not exceed two hundred and fifty dollars": Hill's Ann. Laws, § 908. It will be remembered that the defendant alleged in her complaint in the action to recover possession of the property that the value thereof is \$249, and that in consequence of the unlawful seizure and detention she sustained damage in the sum of \$25, thus making the amount in controversy, in case possession of the property could not be secured, the sum of \$274, which is in excess of the jurisdiction of a justice's court, and its judgment is void unless the remission by defendant's counsel of the sum of \$25 removes the objection: *Camp v. Wood*, 10 Watts, 118. While a diversity of judicial opinion exists as to what constitutes the amount in controversy, it is settled in this state that the sum thus involved is to be determined by the *ad damnum* clause of the complaint, and not by the amount of the judgment: *Troy v.*

Hallgarth, 35 Or. 162 (57 Pac. 374). The defendant not having remitted any part of the damage which she claims to have sustained until the judgment for the possession of the property was rendered, it is not necessary to consider whether a party can waive a part of his claim, so as to bring it within the jurisdiction of an inferior court; for, to accomplish this result, the remitter must be made when the action is begun; otherwise jurisdiction of the subject-matter is not secured: *Litchfield v. Daniels*, 1 Colo. 268. In that case it was held that, if the plaintiff limit the *ad damnum* in his declaration to \$2,000, this shall operate to remit the excess over that sum to the defendant, the court saying: "If there be due on the instrument sued on \$10,000, still if the plaintiff limits his claim to \$2,000 the case is within the jurisdiction of the court. The limitation of his claim in the *ad damnum* operates *per se* as a remittance of whatever amount may be due in excess of \$2,000."

A court's jurisdiction of the subject-matter of an action is determined, in the first instance, from an inspection of the allegations of a complaint. Such jurisdiction, however, may be defeated by the introduction of testimony at the trial, conclusively showing that the subject of the controversy is not within the limit of the court's power: *Corbell v. Childers*, 17 Or. 528 (21 Pac. 670). But where, from an inspection of the complaint, the court does not have, in the first instance, jurisdiction of the subject-matter, neither testimony nor remitter can confer such jurisdiction. The defendant having alleged in her complaint that the value of the property taken and the damage sustained by her was the sum of \$274, which she apparently sought to recover, the justice's court never secured jurisdiction of the subject-matter.

It follows from this consideration that the judgment of the circuit court is reversed, and the cause remanded, with direction to annul the judgment of the justice's court.

REVERSED.

Decided 26 May, 1902.

ON MOTION TO RETAX COSTS.

PER CURIAM. This is a motion to retax costs. The judgment of the court below having been reversed, the appellant filed a cost bill, in which he demanded, *inter alia*, for the transcript of the cause, \$19.20; for printing the abstract of the record and brief, \$116 and \$41, respectively, and for stenographer's fees in preparing papers for the appeal, \$18.75. The respondent, within the time prescribed by statute, objected to these items, alleging that the claim for the transcript was excessive because there had been improperly included therein documents not required; that the reasonable cost of copying records necessary for the appeal could not exceed the sum of \$2.10; that the abstract, in excess of twenty pages, was irrelevant and that the cost of publishing the material part thereof should not be more than \$13; that the brief is greatly enlarged by repetitions and that the relevant part thereof does not exceed twenty-one pages, the publication of which could have been secured for the sum of \$13.60; and that the stenographer's fees were not allowable as a disbursement. The appellant thereupon filed an amended verified statement, wherein he attempted to show that they were reasonable, and that the prolixity of the record was made so by the respondent, thereby requiring a voluminous abstract and brief. The clerk allowed for the transcript the sum of \$10; for printing the abstract, \$31.45; and for the brief, \$28.05; and disallowed the demand for stenographer's fees; whereupon appellant's counsel filed a motion to retax the disputed items, contending that the objections so interposed were not sufficiently definite to authorize the clerk to make any change in the costs so demanded.

3. If the prevailing party, within five days from the entry of judgment, files a statement of the costs and disbursements to which he claims to be entitled, the adverse party, within two days from the time allowed to file the same, may file objections thereto, stating the particulars of such objections: Hill's Ann. Laws, § 556. The objections to the cost bill ought to be suffi-

ciently definite to notify the prevailing party wherein it is claimed the disputed items are unwarranted and to what extent they are unreasonable, and, if the averments are controverted by an amended verified statement, the issues thus framed properly present the questions to be determined by the clerk in the first instance. In the case at bar, the objections specify with particularity the items controverted, and state wherein it is claimed they are unwarranted and to what extent they are excessive and unreasonable, and, in our opinion, are sufficiently definite to call attention thereto and to authorize a revision thereof.

4. The method prescribed for preparing causes for trial in this court, so far as applicable to the question involved, is as follows: "Transcripts on appeal in civil cases, unless otherwise directed by the appellant, shall include only a copy of the judgment roll,—that is, the pleadings upon which the cause was tried, summons and proof of service thereof, bill of exceptions, orders relating to a change of parties, the entry of judgment, and such other journal entries or orders only as involve the merits and necessarily affect the judgment, the notice of appeal, and any order enlarging the time in which to file the transcript, and a certificate of the clerk of the filing of the undertaking": Rule 1 (35 Or. 587, 37 Pac. v). Rule 2 (35 Or. 588, 37 Pac. v,) prescribes the form and arrangement of the transcript, and in a note thereto the following explanation is given: "The foregoing form is intended only as a suggestion, and is to be varied according to the circumstances of each particular case. The actual facts of the case will indicate what is to be done, but in all cases, civil as well as criminal, the transcript is to be prepared substantially in conformity with the above form, giving the proper order and date of filing papers, and incorporating them at the proper date as to the proceedings of the court, omitting from the transcript all unnecessary papers, such as undertakings on appeal, cost bills, when not involved therein, as well as papers and orders which have ceased to perform any office in the case, such as demurrers and original pleadings when superseded by amended ones or

waived by pleading over, unless such original pleadings are necessary to a proper understanding of the questions to be presented on appeal. The title of the court and cause, unless otherwise directed, may be omitted from all papers except the first paper in the cause, but the word 'title' shall be used, the character of the paper, whether complaint, summons, answer, etc., shall be designated. The file marks and indorsements may also be omitted, unless otherwise directed." But when the cause is to be tried on an abstract a copy of the undertaking is also required: Laws, 1899, p. 227. By examining the transcript in the light which these rules afford it is ascertained that the title of the cause, after being stated in the first papers in the case, is repeated forty-one times; that the indorsements made upon such papers, including file marks and in many instances the names of the attorneys, are copied eighteen times, several of which occupy nearly a full page; that the following memorandum is repeated four times, viz.: "The cost of the above and foregoing case is as follows, to wit: Notary's fees, \$1; justice's fees, \$8.05; constable's fees, \$9.20." The petition for the writ of review sets out copies of all the pleadings and papers filed in the justice's court, the action thereon, an original and an amended complaint when the only change consisted in inserting the figure "9" as indicating the number of the justice's district, the original and an alias summons, the returns thereon, motions to set aside the service of each summons, affidavits in support thereof, the judgment of the justice's court, and all other proceedings therein. The writ of review having been issued, the return thereto consists of a repetition of all the matters set out in the petition when a mere recital in the transcript that the record of the justice's court was correctly stated in the petition would have been sufficient for all purposes. In consequence of the unnecessary matter included in the transcript, we think the clerk allowed the appellant all he was entitled to therefor.

5. The abstract contains 116 pages, for the publication of which claim was made in the cost bill of \$1 per page, though the actual cost thereof, as appears by the affidavit of appel-

lant's attorney, was only 85 cents per page. The abstract is nearly a literal copy of the transcript, from which page 81 is reproduced, as follows:

“81

ENDORSED.

ORIGINAL.

In the Justice's Court
of the State of Oregon.

for Polk County,

for District No. 5.

Mrs. Ollie M. Byers,
Plaintiff.

vs.

B. I. Ferguson,
Defendant.

PRAECIPE FOR EXECUTION.

Filed this 4th day of October, 1900.

J. D. IRVINE,
Justice of the Peace.

BONHAM & MARTIN,
Attorneys for Plaintiff.”

This page is a fair sample of the pages numbered 5, 6, 8, 17, 30, 31, 39, 46, 49, 52, 53, 55, 58, 59, 62, 63, 66, 67, 73, 77, 78, 79, 80, 93, and 107, respectively, except in the pages numbered consecutively the indorsement does not usually occupy the entire page. This abstract contains a great deal of useless and unnecessary matter making a cumbrous record, entailing upon the court the labor of separating the material from that which has no bearing on the case, and, in our opinion, the clerk made a liberal allowance for its publication.

6. The greater part of the appellant's brief, from page 2 to 13, is a repetition of the pleadings published in the abstract, and wholly unnecessary, and, in our opinion, the sum allowed therefor was sufficient for the publication of the material part thereof.

7. The appellant was not entitled to any sum whatever for stenographer's fees in preparing the case on appeal, as the clerical work might have been done by his counsel (*Young v. Hughes*, 39 Or. 586, 66 Pac. 272), and the clerk properly struck out the sum demanded therefor.

It follows from these considerations that no change will be made in the costs as taxed by the clerk.

MOTION TO RETAX OVERRULED.

Argued 13 January; decided 27 January, 1902.

BRANDT v. BRANDT.

[67 Pac. 508.]

DIVORCE—SHOWING FOR PERMANENT ALIMONY.

1. A showing that defendant had property worth \$9,000, and a monthly income ample to properly support his family, while plaintiff was entirely without means, was sufficient to justify a decree for \$20 per month permanent alimony.

LIMITATION AGAINST JUDGMENT—DESCRIPTION IN WRIT.

2. A decree in divorce dissolved the bonds of matrimony, awarded permanent alimony to the amount of \$20 a month, and \$128 for costs and living expenses *pendente lite*. Subsequently, after considerable alimony was due, an execution was issued in favor of the complainant in divorce, and against defendant, but which failed to show that it was rendered in a divorce suit, and merely recited that plaintiff had obtained a judgment against defendant for \$128, which was enrolled in the clerk's office, etc.; and on motion to

40 477
47 617

recall the execution defendant contended that the execution was void for uncertainty, and hence insufficient to prevent the running of the statute of limitations, under Hill's Ann. Laws, § 295, as amended by Laws, 1893, p. 26, providing that, if no execution issue on a judgment for ten years, it shall be conclusively presumed to have been paid. *Held*, that the contention was without merit, since, the attack being collateral, and it being sufficiently evident that the execution issued on the decree, the deficiency of the execution as to the recital of the amount recovered, etc., would be disregarded.

DIVORCE—MODIFYING ALLOWANCE OF ALIMONY.

3. Under Section 502 of Hill's Ann. Laws, giving a court power to modify a divorce decree so far as it may provide for "the maintenance of either party to the suit," a decree may be modified so as to retrospectively cut off alimony that has already accrued, upon a proper showing: *Henderson v. Henderson*, 37 Or. 141, applied.

DIVORCE—FINALITY OF ALLOWANCE OF ALIMONY.

4. Ordinarily a decree fixing alimony will be considered final as to the then existing or known conditions; still, where a decree awarding permanent alimony is not based on any consideration of property rights of the wife, but merely as a provision for her support and maintenance, the statute is sufficiently broad to authorize an order releasing defendant from the payment of further alimony, for causes arising subsequently to the decree, where such course appears equitable.

EFFECT ON ALIMONY OF REMARRIAGE OF WIFE.

5. The remarriage of a divorced woman who has been granted alimony is a strong reason for modifying the decree, and where such an order has been made, the husband ought not to be required to subsequently resume the payments.

From Lane: JAMES W. HAMILTON, Judge.

In December, 1888, plaintiff, Alice O. Brandt, instituted a suit for divorce against defendant, A. Park Brandt, on the ground of cruel and inhuman treatment. It is alleged in the complaint, among other things, that plaintiff is without means to prosecute the suit; that \$150 is a reasonable attorney's fee for that purpose; that \$25 a month is reasonable and necessary as an allowance for the support and maintenance of herself and daughter during the pendency of the suit; that "defendant has and owns property in * * * Dakota, and in Multnomah and Lane counties, in the State of Oregon, of the aggregate value of about \$9,000; that he has a good and ample monthly income sufficient to maintain himself and said plaintiff and her said daughter in a suitable manner becoming their station in life." The prayer is for a dissolution of the bonds of matrimony, attorney's fees, and maintenance during the

pendency of the suit, and "that she be awarded such other and further relief as the court may deem equitable and just in the premises." A general demurrer by defendant being overruled, on March 8, 1889, based upon an *ex parte* showing, the court ordered and directed that he pay into court within thirty days \$100, for the use of plaintiff, to enable her to prosecute the suit, and the further sum of \$20, and a like sum every thirty days thereafter, for her maintenance, until the further order of the court. Later there was an effort on the part of the defendant to obtain a modification of the order, but without avail. On April 20, 1889, a divorce was granted, and it was otherwise decreed that plaintiff recover of defendant \$100 as the cost of prosecuting the suit, \$28 as living expenses pending the suit, and the further sum of \$20 per month from the entry of the decree until the further order of the court, as permanent alimony. On December 17, 1897, a writ of execution was issued to the sheriff of Multnomah County, directing him to satisfy the sum of \$128, with interest at the rate of eight per cent. per annum from April 20, 1889. By virtue thereof certain real property was levied upon and sold to the plaintiff for the sum of \$225.25, and the writ returned satisfied. After the execution of a sheriff's deed it was discovered that the realty sold was not the property of defendant, and on March 17, 1900, the sale was, at the instance of plaintiff, set aside, and the satisfaction of the decree canceled, and on the same day another order was entered reviving the decree, wherein it appears to have been found that there was then due and owing on said decree to plaintiff the sum of \$2,820.40, and it was ordered and directed that execution issue to satisfy the same. On March 30 an execution was issued in pursuance of the order, directed to the sheriff of Multnomah County, requiring that out of the property of the defendant he satisfy the said sum of \$2,820.40 and interest, as specified. On April 27 the defendant filed in said cause a motion to set aside the orders of March 17, to recall the execution of March 30, 1900, and, further, if it should be determined that said decree had not been heretofore fully satisfied or barred by lapse

of time, then that the sum of \$20 a month allowed by the original decree be remitted from and after May 2, 1889. The motion was based upon an affidavit of the defendant, which sets out all the proceedings from the entry of the decree and the order directing the issuance of the execution, and shows that the plaintiff was, in January, 1890, married to one W. T. Shurtliff, and lived with him for a time, and was adequately supported by him in the manner to which she had been accustomed, but that Shurtliff had procured a divorce from her. It was also averred that defendant had no knowledge that the decree granting the divorce from him contained the provision for \$20 a month permanent alimony, and that he was never apprised or informed of the fact by plaintiff, or any one in her behalf, or requested by her to pay the same. The plaintiff in response filed a counter affidavit, whereby she avers that defendant knew of the provision complained of at the time of its entry, but declared that he would not pay the same, and that, while it was true that she was married again in the month of January, 1890, she was driven to do so by poverty and want, being unable to support herself and daughter; that in the year 1896 her husband deserted her; and that she has since been obliged to earn her living, and is without property or means for her support. The motion was denied, and from the order and decree denying the same defendant appeals.

MODIFIED.

For appellant there was an oral argument by *Mr. Wm. Torbert Muir*, with a brief over the name of *Fenton & Muir*.

Power to Modify the Original Decree—

The court undoubtedly has the power to make the order now asked for: *Hill's Ann. Laws*, § 502; *Corder v. Speake*, 37 Or. 105 (51 Pac. 647); *Henderson v. Henderson*, 37 Or. 141 (48 L. R. A. 766, 82 Am. St. Rep. 741, 60 Pac. 597); *Olney v. Watts*, 43 Ohio St. 499, 508 (8 N. E. 354); *Hopkins v. Hopkins*, 40 Wis. 462; *Perkins v. Perkins*, 12 Mich. 456, 457; *Weld*

v. *Weld*, 28 Minn. 33 (8 N. W. 900); *Ex parte Hart*, 94 Cal. 254 (29 Pac. 774).

Construction of Section 502—

Section 502 of Hill's Code, does not limit the power of the court to annul or alter a decree for the future; the order may be prospective or retrospective. •

Right of Remarried Wife to Alimony—

When a divorced wife remarries she has no right to alimony or support from her former husband: *Morgan v. Lowman*, 80 Ill. App. 557-559; *Stillman v. Stillman*, 99 Ill. 196-204 (39 Am. Rep. 21); *Bowman v. Worthington*, 24 Ark. 522; *Southworth v. Southworth*, 168 Mass. 511 (47 N. E. 93); *Albee v. Wyman* 10 Gray (Mass.), 222; *Rogers v. Vines*, 28 N. C. (6 Ired. L.) 293; *Lockridge v. Lockridge*, 2 B. Mon. (Ky.) 258; *Bankston v. Bankston*, 27 Miss. 692; *Olney v. Watts*, 43 Ohio St. 499 (8 N. E. 354); *Casteel v. Casteel*, 38 Ark. 477, 482; *Hopkins v. Hopkins*, 40 Wis. 462; *Perkins v. Perkins*, 12 Mich. 456; *Sheafe v. Sheafe*, 36 N. H. 155; 2 Nelson, Div. & Sep. § 932.

Validity of Execution—

The writ does not describe the judgment or decree with sufficient certainty, and is void: 1 Freeman, Ex. § 43.

For respondent there was an oral argument with a brief by *Mr. John H. Hall*.

Execution of 1897 was Valid—

The execution issued on the seventeenth day of December, 1897, was sufficient to stop the running of the statute of limitations, and was not void, as it substantially conformed to the statute, and sufficiently identified the judgment so that any person of common intelligence and understanding could readily ascertain what judgment was intended to be described therein; this is all that is required, as the authorities are unanimous upon the proposition that the form of an execution

will not vitiate it if intent and substance are clear and the judgment can be identified: *Jones v. Dove*, 7 Or. 467; *Flint v. Phipps*, 20 Or. 340 (23 Am. St. Rep. 124, 25 Pac. 725); *Hunt v. Loucks*, 38 Cal. 372 (99 Am. Dec. 404); *Peck v. Tiffany*, 2 N. Y. 451; *Brace v. Shaw*, 16 B. Mon. (Ky.) 82; *Daly v. State*, 56 Miss. 475; *Pamille v. Hitchcock*, 12 Wend. 96; *Wright v. Nostrand*, 94 N. Y. 32; *Newman v. Willits*, 60 Ill. 519; *Van Cleve v. Brecher*, 79 Cal. 600; *Corbin v. Pearce*, 81 Ill. 461; *Trotter v. Nelson*, 31 Tenn. (1 Swan), 7; *Harlan v. Harlan*, 82 Tenn. (14 Lea) 107; *Jones v. Goodbar*, 60 Ark. 182; *Anderson v. Gray*, 134 Ill. 550 (23 Am. St. Rep. 696); *Dean v. Goddard*, 13 Iowa, 292 (81 Am. Dec. 433); *Hall v. Caggett*, 63 Md. 58; *Miles v. Knott*, 12 Gill. & J. (Md.) 300; *Perkins v. Spaulding*, 2 Mich. 157; *McMahon v. Evans*, 2 Ala. 68; *Williams v. Brown*, 28 Iowa, 247; *Morrison v. Austin*, 14 Wis. 653; *Graham v. Price*, 3 A. K. Marsh (Ky.), 522 (13 Am. Dec. 199); *Railsback v. Lovejoy*, 116 Ill. 442; *Greene v. Cole*, 35 N. C. (13 Ired. L.) 425; *Ellis v. Jones*, 51 Mo. 180.

Effect of Remarriage on Right to Alimony—

A subsequent marriage of a divorced wife will not of itself preclude her from recovering alimony accruing after said marriage: *Kamp v. Kamp*, 59 N. Y. 212; *Park v. Park*, 18 Hun, 466; *Shephard v. Shephard*, 1 Hun, 240; *Forest v. Forest*, 25 N. Y. 501; *Mitchell v. Mitchell*, 20 Kan. 665; *Stratton v. Stratton*, 73 Me. 481; *Kerr v. Kerr*, 59 How. Prac. 255; *Sampson v. Sampson*, 16 R. I. 456 (3 L. R. A. 349); *Sammes v. Medbury*, 14 R. I. 214; *King v. King*, 38 Ohio St. 370; *Smith v. Smith*, 45 Ala. 264; *Stillman v. Stillman*, 99 Ill. 196 (39 Am. Rep. 21); Bishop, Mar. Div. & Sep. §§ 1056 to 1062; 2 Am. & Eng. Ency. Law (2 ed.), pp. 129-140.

MR. JUSTICE WOLVERTON, after stating the facts, delivered the opinion of the court.

1. It is first insisted that the provision for permanent alimony is in excess of the relief to which the plaintiff was entitled under the averments and prayer of her complaint.

Under the prayer for general relief the plaintiff is entitled to such relief as is consistent with the averments and within the scope of the complaint. It is alleged that defendant was possessed of property of the value of \$9,000 and had a monthly income amply sufficient for the maintenance of himself, his wife, and her daughter according to their station in life; and, permanent alimony being an incident to the divorce, the provision complained of was within the scope of the complaint, and the relief was authoritatively granted by the decree: 16 Ency. Pl. & Pr. 804, 807, 808; *Darrow v. Darrow*, 43 Iowa, 411.

2. It is next insisted that the statute of limitations had run, so that it was not competent for the court to revive the decree and direct the issuance of an execution. This depends upon whether the writ of execution of December 17, 1897, by virtue of which a sale of the property was attempted to be made, was void for uncertainty in describing the decree upon which it was issued. The description is contained in the preamble, and is as follows: "Whereas, on the twentieth day of April, 1889, by consideration of the Circuit Court of the State of Oregon for the County of Lane, Alice O. Brandt, plaintiff, recovered judgment against A. Park Brandt, defendant, for the sum of one hundred and twenty-eight and no one-hundredths (\$128.00) dollars, damages and costs, which judgment was enrolled and docketed in the office of the clerk of said court on the second day of May, 1889." It will be noted that no reference is there made to the provision for permanent alimony. The statute provides that if, at any time after the entry of the judgment, a period of ten consecutive years shall have elapsed without an execution being issued thereon, no execution shall thereafter issue, and the judgment shall be conclusively presumed to have been paid: Hill's Ann. Laws, § 295, as amended by Laws, 1893, p. 26. We take it that an execution such as is sufficient, under a decree upon which it is based and issued, to support a deed to property sold under and in pursuance thereof, will be sufficient also to revive, keep alive, or continue in force the decree itself. The analogy is apparent, and the deduction legitimate. Suppose that realty

should be sold under the execution now in the hands of the sheriff, and the purchaser's title was questioned. Would the execution of December 17, 1897, be received as evidence to show that the decree was not barred by the 'ten years' lapse of time? If sufficient to support a deed in the first instance, it surely would be sufficient to show a live judgment or decree when the execution was issued under which the sale was made. Now, the inquiry to be made, where the execution is offered in support of a deed, is, did it issue on the decree that is produced to support it? If it is manifest from the writ, taken in its entirety, that it did, then it must be held to be effective. Now, the more rational and wholesale rule seems to be, where sufficient appears upon the face of the writ to unmistakably connect it with the judgment or decree, to disregard variances as it respects the names of parties, dates, and the amount recovered: 1 Freeman, Ex'ns (3 ed.), § 43; Alderson, Jud. Writs, § 53; *Hunt v. Loucks*, 38 Cal. 372 (99 Am. Dec. 404); *Cooley v. Brayton*, 16 Iowa, 10; *Cunningham v. Felker*, 26 Iowa, 117. We adopt this rule, therefore, for the present purpose, inasmuch as this is a collateral attack as it respects the particular execution concerned. No one can doubt, upon a reading of the writ, that it was issued upon the final decree entered in this cause.

3. The next and final contention is that the decree, in so far as it awards the plaintiff \$20 a month permanent alimony, should be annulled as of the date of its entry. This involves two questions: (1) Whether it is within the power of the court so to annul it; and (2) whether it is equitable and just, under the showing of the respective parties, to do so. It is conceded that, within the doctrine of *Corder v. Speake*, 37 Or. 105 (51 Pac. 647), and *Henderson v. Henderson*, 37 Or. 141 (82 Am. St. Rep. 741, 60 Pac. 597, 61 Pac. 136, 48 L. R. A. 766), the court may set aside, alter, or modify a decree respecting permanent alimony. But it is denied that it is authorized to make any order in the premises that could operate retrospectively, and thus cut off alimony that had previously accrued under the decree granting it. There is a cleavage

among the authorities touching the nature of alimony granted in connection with an absolute divorce. At common law the allowance made for the support of the wife, where there was a separation *a mensa et thoro*, was denominated "permanent alimony," and many authorities, treating the allowance made after divorce absolute as inuring upon like principles, have therefore declared that it was competent for the courts to revise, modify, or cut it off altogether, according as the changed conditions of the parties concerned and equitable considerations may suggest. Other of the authorities treat the allowance, whether in gross or in periodical payments, as an adjudication of property rights in assimilation to a settlement of partnership affairs, where the wife's property of which the husband has become possessed, the accumulations during coverture, her inchoate dower, and the obligations to support her in a manner suitable to her station in life, are all taken into account, and the alimony granted in lieu thereof; and hence they have declared that the decree becomes a matter *res adjudicata* and insusceptible of future revision or modification. Our statute, however, as construed by the decisions above cited, is broad enough to permit of the setting aside, alteration, or modification of the provision made for the maintenance of either spouse. To set aside is "to annul, to make void": Bouvier, Law Dict. Anything less than an annulment would be an alteration or modification. So it would seem that the court is clothed with power adequate to set aside, as well as to alter or modify, a provision for permanent alimony or allowance as the exigencies of the case may require.

4. Notwithstanding, the allowance should be treated as *res adjudicata* as to the then existing circumstances and conditions, and not subject to annulment or modification, except upon new conditions subsequently arising, or, perhaps, upon facts occurring before the decree, of which the party was excusably ignorant at the time of its rendition: *Wilde v. Wilde*, 36 Iowa, 319; *Reid v. Reid*, 74 Iowa, 681 (39 N. W. 102); *White v. White*, 75 Iowa, 218 (39 N. W. 277); *Semrow v. Semrow*, 23 Minn. 214; *Weld v. Weld*, 28 Minn. 33 (8 N. W.

900). And where the allowance proceeds from a consideration of the restitution of property brought to the husband by reason of the marriage, or the partition of property accumulations, it should be regarded as a final adjudication of the matter: *Cole v. Cole*, 142 Ill. 19 (31 N. E. 109, 19 L. R. A. 811, 34 Am. St. Rep. 56). But where it is made as a matter of support and maintenance merely, then the changed condition of the parties, as where the faculties of the husband have diminished, or the divorced wife has acquired other facilities or means of support, will warrant such a revision or modification, diminishing or cutting off the allowance *in toto*, as may seem reasonable and proper [*Cole v. Cole*, 142 Ill. 19 (19 L. R. A. 811, 34 Am. St. Rep. 56, 31 N. E. 109); *Stillman v. Stillman*, 99 Ill. 196 (39 Am. Rep. 21); *Lennahan v. O'Keefe*, 107 Ill. 620; *Bowman v. Worthington*, 24 Ark. 522; *King v. King*, 38 Ohio St. 370; *Olney v. Watts*, 43 Ohio St. 499 (3 N. E. 354)], and the decree may be made to operate retrospectively: *Morgan v. Lowman*, 80 Ill. App. 557. The remarriage of the wife is a persuasive circumstance, calling for an exercise of the court's discretion and authority to modify or rebate the allowance: *Albee v. Wyman*, 10 Gray, 222; *Bowman v. Worthington*, 24 Ark. 522; *Morgan v. Lowman*, 80 Ill. App. 557; *Olney v. Watts*, 43 Ohio St. 499 (3 N. E. 354); *Stillman v. Stillman*, 99 Ill. 196 (39 Am. Rep. 21).

5. A consideration of the original decree and the grounds upon which it is based indicates that the allowance did not proceed from any consideration of property rights of the wife, but merely as a provision for her support and maintenance, together with the support and maintenance of her daughter. The daughter, it should be noted, was the child of a former husband, and not of the defendant. Some nine months subsequent to her divorce, the plaintiff married Shurtliff, and continued to be his wife for more than six years, during which time it is alleged, and not denied, that he supported her adequately according to her station in life; and this of itself ought to relieve the defendant of her support. It seems somehow inconsistent, from the standpoint of morality and public

policy, that a wife should be receiving support from a former divorced spouse, while she is by reason of existing marital ties entitled to look to an actual spouse for maintenance of the same nature; and, if this is true while the marital relations exist, why should the right of support by the former husband be revived when the latter husband divorces her for cause? By this reasoning, we do not mean to be understood as holding that a subsequent marriage will *ipso facto* dissolve the obligation of the former husband to continue the payment of the allowance, for the authorities do not seem to go so far; but we do mean to say that it affords a cogent and convincing reason for the court to modify or cut off the allowance altogether. The plaintiff avers that since her late husband deserted her—which is equivalent to saying since he procured a divorce from her, for such is the admitted fact—she has been obliged to earn her own living, and that she is without property or means. But this cannot serve to reinstate her to her former condition. The question of accepting support from her subsequent husband was a matter necessarily deferred to her own choice, and she must be held in a measure to have renounced her allowance, to the extent, at least, of her latter husband's ability to respond. In this instance he was able to, and did, support her adequately. That support has been cut off by no fault of the defendant, and there are no considerations of right or equity that would require him to again assume the obligation. It is quite probable that defendant has been led to believe that he was not held to the payment of the allowance, although he is chargeable with knowledge that such an allowance was actually made, and this accounts in some measure for the great lapse of time without any effort to respond, and the plaintiff has only recently become importunate in exacting the permanent allowance, which at this time has increased to a large sum.

In consideration of the conditions revealed by the record, the allowance will be discontinued and annulled from and after January 20, 1890, which is about the date of plaintiff's subsequent marriage. The annulment of the sale under the

execution of December, 1897, will not be disturbed, but the execution now in the hands of the sheriff will be recalled, and an order and decree now entered directing execution to issue for \$128, as costs and expenses *pendente lite*, and the further sum of \$180, permanent alimony, with interest on the former sum at eight per cent. per annum from April 20, 1889, and upon the latter at the same rate from January 20, 1890, diminished by the defendant's costs and disbursements incurred by this proceeding, both in the trial court and upon the appeal; he being entitled to recover the same from the plaintiff.

MODIFIED.

Decided 3 February; rehearing denied 22 April, 1902.

MOORE v. SHOFNER.

[67 Pac. 511.]

PLEADING—PLEAS IN EQUITY—OBJECTION TO JURISDICTION.

1. Under the practice in Oregon, the common law pleas in equity no longer prevail, and objections to the jurisdiction are presented by other pleadings.

SUIT TO QUIET TITLE—POSSESSION.

2. In a suit under Section 504 of Hill's Ann. Laws, as amended by Laws, 1899, p. 227, § 1, providing that anyone claiming an interest in realty not in the actual possession of another may maintain a suit in equity against persons claiming adversely to determine their claims, it is necessary to both plead and prove that the land is not in the possession of anyone.

PLEADING—CONSTRUCTION OF ANSWER.

3. In a suit to determine an adverse claim to realty under Section 504 of Hill's Ann. Laws, as amended (Laws, 1899, p. 227), defendant first filed an answer denying plaintiff's allegation that no one was in possession, asserting actual possession in himself, averring that the court was without jurisdiction, and praying that the suit be abated. This answer was treated as in abatement, and denied by the court, whereupon defendant filed another answer, in which, after repeating the first, he denied plaintiff's title, asserted title in himself and possession for more than ten years, pleaded an estoppel, and again denied the court's jurisdiction. *Held*, that defendant did not waive the objection to the jurisdiction by filing the second answer, the trial thereon being in effect, a retrial as to the jurisdiction on an amended answer: and hence the appellate court must try the case *de novo* on the amended pleadings.

PROOFS IN SUITS TO QUIET TITLE.

4. Unless the plaintiff in a suit to determine an adverse interest to realty proves that the premises are not in the possession of anyone, there is no equitable jurisdiction, and the complaint should be dismissed without any attempt to settle questions of title.

From Multnomah: JOHN B. CLELAND, Judge.

Suit by C. A. Moore against J. C. Shofner. There was a decree for defendant, from which plaintiff appeals.

MODIFIED.

For appellant there was a brief by *Mr. Chas. A. Moore*, in *pro. per.*, with an oral argument by *Mr. Moore* and *Mr. Frank Schlegel*.

For respondent there was a brief over the names of *Horace B. Nicholas* and *Newton McCoy*, with an oral argument by *Mr. Nicholas*.

MR. JUSTICE WOLVERTON delivered the opinion.

This is a suit to determine an adverse estate or interest in realty. The complaint contains allegations that the plaintiff is the owner in fee simple of the property in controversy, consisting of four lots in Carter's Addition to the City of Portland, and that it is not in the actual possession of any one else. His title depends upon four deeds executed by the Chief of Police of the City of Portland in pursuance of bids made by him at the sales of the respective lots for delinquent sewer assessments, the defendant being the owner at the time of the assessments and sales. To the complaint the defendant first filed an answer, denominated a plea in abatement, by which he simply denied that no one is in possession of the premises, and set up that he is now, was at the time of the commencement of the suit, and for a long time prior thereto had been, in actual possession, and other facts indicating such possession, followed by an averment that the court was without jurisdiction of the subject-matter, and a prayer that the suit be abated. This was treated as a plea in abatement, and a trial was had upon the issues tendered, resulting in a denial of the plea. Thereupon defendant filed an answer denying that plaintiff was the owner in fee, and that no one is in actual possession, and, the other allegations having been controverted,

for a separate defense he alleges that he is now, and has been for more than ten years last past, the owner in fee of said lots, and in the actual, open, notorious, and adverse possession of them as against all the world, and that neither the plaintiff, his ancestors, predecessor, nor grantor has been seised or possessed thereof within ten years next preceding the commencement of this suit; wherefore it is insisted that plaintiff is barred and estopped from maintaining the suit, and that the court has no jurisdiction of the cause. This was treated as an answer to the merits by the trial court, and so tried out, resulting in a decree dismissing the complaint, decreeing that the defendant was the owner in fee simple of the property, and awarding him costs and disbursements; from which decree the plaintiff appeals.

There was much discussion at the hearing concerning the nature of the defenses interposed, it being contended upon the one side that the first answer was purely a plea in abatement, and, the court having disposed of the matter and passed on to the hearing under the subsequent answer upon the merits and the defendant not having appealed, that he is precluded from insisting upon a hearing here as to that plea; while on the other hand, it is insisted that both pleas constituted answers going to the jurisdiction of the court, and that the second hearing should be treated as a rehearing upon the same question, and therefore that defendant is entitled to a hearing in this court upon the whole matter, the trial being *de novo*.

1. Our statute provides that "the objection to the jurisdiction of the court, or that the complaint does not state facts sufficient to constitute a cause of suit, if not taken by demurrer or answer, may be made on the trial": Hill's Ann. Laws, § 392. Within the purview of that section, objection to the jurisdiction of the court may be taken by answer; and pleas in equity, as known to the common law, seem to have been dispensed with.

2. The suit is instituted under Section 504 of Hill's Ann. Laws, as amended by Laws, 1899, p. 227, which provides: "Any person claiming an interest or estate in real estate not

in the actual possession of another, may maintain a suit in equity against another who claims an interest or estate therein adverse to him, for the purpose of determining such conflicting or adverse claims, interests or estates." The original section gave the right of suit to any person in possession by himself or tenant, and its purpose and the scope of its meaning has become well understood. In construing the section in the early case of *Stark v. Starrs*, 73 U. S. (6 Wall.) 402, 410, Mr. Justice FIELD says: "We do not, however, understand that the mere naked possession of the plaintiff is sufficient to authorize him to institute the suit, and require an exhibition of the estate of the adverse claimant, though the language of the statute is that 'any person in possession, by himself or his tenant, may maintain' the suit. His possession must be accompanied with a claim of right,—that is, must be founded upon title, legal or equitable,—and such claim or title must be exhibited by the proofs, and, perhaps, in the pleadings also, before the adverse claimant can be required to produce the evidence upon which he rests his claim of an adverse estate or interest." So, in *United States v. Wilson*, 118 U. S. 86, 89 (6 Sup. Ct. 991, 992), it is said: "Bills *quia timet* such as this is, to remove a cloud from a legal title, cannot be brought by one not in possession of the real estate in controversy, because the law gives a remedy by ejectment, which is plain, adequate, and complete." And by the adjudications of this court, without possession the plaintiff could not maintain the suit: *Kelly v. Ruble*, 11 Or. 75, 108 (4 Pac. 593); *Edgar v. Edgar*, 26 Or. 65 (37 Pac. 73); *O'Hara v. Parker*, 27 Or. 156 (39 Pac. 1004); *Lovelady v. Burgess*, 32 Or. 418 (52 Pac. 25); *Silver v. Lee*, 38 Or. 508 (63 Pac. 882). The same result has been reached in adjudications elsewhere: *Brooks v. Calderwood*, 34 Cal. 563; *Shaffer v. Whelpley*, 37 Wis. 334; *Churchill v. Onderdonk*, 59 N. Y. 134.

Under the ordinary equitable jurisdiction to remove a cloud and to quiet possession to realty the bill could not be maintained without clear proof of both possession and legal title in the plaintiff: *Frost v. Spitley*, 121 U. S. 552 (7 Sup.

Ct. 1129), and cases cited at p. 556, 121 U. S. (p. 1129, 7 Sup. Ct.) The statutory provision for determining an adverse claim is an enlargement of the common-law right, but the necessity of allegations and proof as to the title relied on and possession remains. The amendment of 1899 changed the condition upon which the suit may be maintained, and the plaintiff now has his remedy in equity to determine an adverse or conflicting claim if the realty be not in the actual possession of another. The purpose, no doubt, was so to enlarge the remedy that the title may be quieted where the lands are vacant and unoccupied, and the plaintiff is unable to show such a possession as to bring himself within the purview of the old statute. Illinois has a statute that gives the remedy "whether the lands in controversy are improved or occupied, or unimproved and unoccupied." Construing this act in connection with the former practice under the old equity system, the court say: "Since that enactment we have held there are only two cases under our law in which a party may file a bill to quiet title or to remove a cloud from the title to real property: First, where he is in possession of the lands; and, second, where he claims to be the owner, and the lands in controversy are unimproved and unoccupied": *Gage v. Abbott*, 99 Ill. 366, 367, citing *Hardin v. Jones*, 86 Ill. 313. And as to the necessity of proof that the premises are unoccupied it was said in *Glos v. Randolph*, 133 Ill. 197 (24 N. E. 426): "The bill alleges, among other things, 'that said real estate is vacant and unoccupied.' This allegation is material. There are but two cases under our statute in which a bill to remove cloud from title can be maintained, viz., where the complainant is in possession of the premises, or where they are unoccupied. * * * There is no evidence whatever in this record tending to prove the allegation, nor is it admitted by the answer. * * * For want of proof on the part of the appellee that at the time she filed her bill the premises in question were unoccupied, her bill should have been dismissed." So that here we have an interpretation of an analogous statute and an indication as to the proper practice within its purview. It

is shown to be necessary that the owner of real estate seeking to have his title thereto quieted must allege and prove that it is not in the possession of another, otherwise he will be relegated to a court of law, where he has an adequate remedy, and a denial thereof is a challenge to the jurisdiction of the court. Under the old equity practice the question was raised by a plea to the jurisdiction, but under the statute it is presented by answer. Such a denial by answer, under the authorities, puts the plaintiff to his proof, and if he fails therein the relief will be withheld; and this is as far as the defendant needs to go with his answer, if he relies upon the want of equitable jurisdiction to defeat the suit [*Love v. Morrill*, 19 Or. 545 (24 Pac. 916)]; for, if he sets up his own title, and asks affirmative relief, he thereby submits himself to the jurisdiction of the court, and cannot further insist that plaintiff ought not to maintain his suit in equity [*O'Hara v. Parker*, 27 Or. 156 (39 Pac. 1004); *State v. Blize*, 37 Or. 404, 61 Pac. 735)].

3. In the case at bar the defendant, by his plea, so called, simply denies the allegation that no one was in possession, and sets up his own possession, running back for more than ten years last past, while in his answer he denies both title and that no one is in the actual possession, and sets up as a further and separate defense that he is the owner in fee, and other matters showing that by reason of his adverse possession for more than ten years plaintiff is not entitled to maintain the suit. He asks no affirmative relief, but insists that by reason of the facts alleged the court has no jurisdiction, thus indicating as plainly and strongly as possible that he was relying solely upon the want of equitable jurisdiction to defeat the plaintiff's cause of suit, not that he proposed measuring the strength of his own title with that of plaintiff, and was willing that a court of equity should determine the controversy. Both the plea, so-called, and the answer are of the same nature. The only difference is that the answer goes a little further in its denials and affirmative allegations, but it does not change the nature of the relief sought; and thus both question the jurisdiction of the court. The only effect, therefore, of the

trial upon the second answer was a retrial as to the jurisdiction upon an amended answer, and this court must try the case anew as presented by the amended pleadings, the so-called plea being virtually out of the case, as it has been superseded by the answer.

4. At the trial the plaintiff simply introduced his deeds executed by the chief of police, and rested, without attempting to show that the property was not in the actual possession of another. The defendant thereupon offered his title deeds, and showed that he was then in possession, and had been since long prior to the institution of the suit; that his possession consisted in having the lots inclosed with a fence, and using them as a pasture for his cows, and having a spring house built over a spring thereon, from which water was used to supply the dwelling. This disproves plaintiff's cause, to say nothing of his failure to establish his allegation that the lots were not in the actual possession of another, the burden of which, as we have seen, was with him; and he must, therefore, fail, because he has not established the facts necessary to call into requisition the equitable jurisdiction to give him relief. The court below decreed the title to be in the defendant. Being without jurisdiction, it could not go to that extent. The defendant had not demanded it, and the court should have dismissed the complaint merely with costs to the defendant, and such will be the order of this court.

The decree of the court below will be modified accordingly.

MODIFIED.

Argued 29 January; decided 17 February, 1902.

AMES' WILL.

AMES v. AMES.

[67 Pac. 737.]

40	495
40	585
40	495
47	318

WILL—NECESSITY OF REQUESTING WITNESS TO SIGN.*

1. A person who has seen a testator sign a will and then signs as a witness thereto signs "at the request" of the testator if the latter understands what is being done and apparently assents thereto.

APPOINTMENT OF GUARDIAN AS EVIDENCE OF MENTAL INCAPACITY.

2. The appointment of a guardian for a person alleged to be mentally incompetent is presumptive evidence that the person under guardianship is not of sound mind and memory, but it is not conclusive by any means.

WILL—TEST OF TESTAMENTARY CAPACITY.

3. If a testator, when executing his will, understands what he is doing, knows what he has to dispose of and how he wishes it distributed, he has testamentary capacity, though he may be very old, and sick and extremely debilitated and distressed: *Swank v. Swank*, 37 Or. 439, cited and approved.

WILL—LACK OF TESTAMENTARY CAPACITY.

4. The fact that a person over seventy years old, who had been for many years a believer in the Mormon faith, was in failing health for some time prior to the making of his will, and sometimes talked to the picture of the founder of his church, believing that this deceased person possessed the "keys of the kingdom," and could hear and understand what was said to him, and sometimes cracked his fists together when excited, does not show testamentary incapacity.

WILL—UNDUE INFLUENCE.

5. Whatever undue influence may have been exerted over the testator whose will is here contested was not until after the will had been executed, and so could not have influenced its terms.

From Linn: REUBEN P. BOISE, Judge.

This is a controversy respecting the probate of an alleged will. The proponent, Andrew J. Ames, filed a petition in the county court of Linn County showing that Lowell Ames, his brother, died in said county April 16, 1899, being at the time a resident thereof, and leaving an estate therein of the probable value of \$2,500; that he left a will in which he nominated the petitioner and Joseph S. Ames, another brother, as execu-

*NOTE.—The following cases are in point in connection with this decision: What is a Request by Testator—*Cook v. Winchester*, 8 L. R. A. 826, note; *Burney v. Allen*, 74 Am. St. Rep. 637, note.—REPORTER.

tors thereof, but that the latter declines to serve as such; that the testator at the time of executing said will was over twenty-one years old, of sound and disposing mind and memory; that he left surviving him, as his only heir, Mary E. Ames, his widow, about 62 years old, residing at Sweet Home, in said county,—and praying that such will be admitted to probate, and letters testamentary issued to him. The will was executed January 30, 1899, and it appears therefrom that the testator bequeathed to his niece Anna Ames the sum of \$500; that he devised to the petitioner the undivided half of his real property, or, in case he should not die seised thereof, bequeathed to him in lieu thereof the sum of \$1,000; and that he gave, bequeathed, and devised to said Joseph the remainder of his property, making no provision whatever for his wife. The widow, contesting the probate of the will, denied the material allegations of the petition, and averred, in substance, that Lowell for several years prior to his death had been in failing health, debilitated in body, and of weak and unsound mind and memory; that his brothers, Andrew and Joseph, well knowing his physical and mental condition, abducted him from his home in January, 1899, and prevented him from returning thereto, and caused him to execute said will by means of undue influence and misrepresentation, particularly describing the conduct which it is claimed rendered the testament void; and that said will was not executed with the formalities required by law. A reply having put in issue the allegations of new matter in the contestant's objection to the probate of the will, a trial was had before said court, which found, from the testimony taken, that on January 30, 1899, Lowell did not possess testamentary capacity; that he was unduly influenced to execute said will,—denied the probate thereof, and declared the same null and void. On appeal from this decree the circuit court found that the testator at the time he executed the will was of sound and disposing mind and memory; that in making said will he was not acting under any undue influence; that the instrument was duly executed, and decreed that it was the last will of the deceased, admitted

it to probate, and appointed Andrew J. Ames executor thereof, —reversing the decree of the county court, and remanding the cause for such further proceedings as might be necessary; and from the latter decree the widow appeals to this court.

AFFIRMED.

For appellant there was a brief and an oral argument by *Messrs. S. M. Garland and H. C. Watson.*

For respondent there was a brief over the names of *Hewitt & Sox* and *J. J. Whitney*, with an oral argument by *Mr. Whitney* and *Mr. Henry H. Hewitt.*

MR. JUSTICE MOORE, after stating the facts delivered the opinion of the court.

It is claimed by contestant's counsel (1) that the testimony shows the purported will was not witnessed in the manner prescribed by law; (2) that, at the time it was executed, Lowell Ames was not of sound and disposing mind and memory; and (3) that he was at that time acting under the undue influence of his brothers, Andrew and Joseph, and hence the court erred in admitting said pretended will to probate. Considering these claims in their order, the testimony involved in each will be examined.

1. The will is dated January 30, 1899, is signed by the testator, and contains the following attestation clause:

“The foregoing instrument, consisting of one sheet, was at the date thereof signed, sealed, published, and declared by the said Lowell Ames as and for his last will and testament, in presence of us, who, at his request and in his presence, and in the presence of each other, have subscribed our names as witnesses thereto.

N. M. NEWPORT, Residing at Albany, Linn County, Oregon.

L. C. MARSHALL, Residing at Albany, Linn County, Oregon.”

The testimony shows that Lowell told the attesting witness Newport, an attorney at law, what testamentary disposition he desired to make of his property, and the names of the per-

sons selected as executors, and that a memorandum thereof was made by Newport, who dictated to the attesting witness Miss Lena Marshall, a stenographer in his office, the contents of the will, which she reduced to writing, whereupon he proposed to Lowell that Miss Marshall and he would witness the will, if satisfactory. She was then called from an adjoining room into the main office, where the will was read to and signed by the testator in the presence of the witnesses, and signed by them in his presence and in the presence of each other; but he did not personally request Miss Marshall to witness the will, and may not have heard Newport when he invited her to do so. The statute prescribing the method of executing a testament, is as follows: "Every will shall be in writing, signed by the testator, or by some other person under his direction, in his presence, and shall be attested by two or more competent witnesses, subscribing their names to the will, in the presence of the testator": Hill's Ann. Laws, § 3069. "A subscribing witness is one who sees a writing executed, or hears it acknowledged, and at the request of the party thereupon signs his name as a witness": Hill's Ann. Laws, § 757. No evidence having been offered of a personal request by the testator to Miss Marshall to witness his will, is her signature appended to that instrument in pursuance of Newport's request a sufficient attestation of the testament? It does not appear from the testimony that the door to the room occupied by her was open when she was invited to witness the will, and hence it is impossible to say that any request was made to her in the testator's presence or hearing. In *Nelson v. McGiffert*, 3 Barb. Ch. 158 (49 Am. Dec. 170), Chancellor WALWORTH, construing a statute of New York which required the witnesses to a will to subscribe their names thereto at the request of the testator, said: "Not only the witnesses, but the testator himself, must, therefore, have understood that they were witnessing the execution of the will, in conformity to his desire and wish, although he may not have said, in terms, 'I request you, and each of you, to subscribe your names as witnesses to this, my will.' If such a formal re-

quest was necessary to be proved in all cases, and the witnesses were required to recollect the fact, so far as to be able to swear to it after any considerable lapse of time, not one will in ten would be adjudged to be valid." Mr. Schouler, in his work on Wills (2 ed.), § 329, discussing this subject, says: "The request that witnesses should attest and subscribe one's will may be inferred from acts and conduct of the testator, as well as his express words; the law regarding the substance, rather than the literal form, of such matters. It is not essential, therefore, that the testator should expressly ask the subscribing witness to attest his will. His acts, his gestures, may signify this request,—whatever, in fact, implies his knowledge and free assent thereto. Indeed, the active part in procuring the witnesses and requesting them to attest and subscribe is not infrequently borne by some friend, near relative, or professional counsel; and if such third person acts truly for the testator, in his conscious presence and with his apparent consent, the legal effect is the same as though the testator himself had spoken and directed the business." In *Re Meurer's Will*, 44 Wis. 392, 399 (28 Am. Rep. 591), it was held that no specific request by the testator to the witnesses to sign the will is necessary, and that if they subscribe their names in his presence, and without objection on his part, he knowing the fact that they are signing as witnesses, it is sufficient. Lowell having seen the witnesses attest his will, and knowing that they subscribed it in that capacity, and having made no objection thereto, the instrument was properly executed: *Coffin v. Coffin*, 4 Mass. 1 (80 Am. Dec. 235); *Moore v. Moore*, 2 Bradf. Sur. 261; *Rutherford v. Rutherford*, 1 Denio, 33 (43 Am. Dec. 644); *Peck v. Cary*, 27 N. Y. 9 (84 Am. Dec. 220); *Gilbert v. Knox*, 52 N. Y. 125.

2. It is contended by contestant's counsel that, on the day said pretended will purports to have been executed, Lowell was declared incompetent by a court which had jurisdiction of the person and subject-matter, and that the decree therein appointing a guardian of his person and estate raises the disputable presumption that he did not possess sufficient tes-

tamentary capacity at that time, to overcome which required evidence so strong as to leave no reasonable doubt as to his capacity to make a valid will, and, the testimony introduced by the proponent being insufficient for that purpose, the court erred in admitting it to probate. The testimony shows that Lowell at the time he executed the will in controversy was seventy-two years old; that he had been married about eleven years, and lived with his wife on a farm in Linn County, Oregon; that in January, 1899, George Knable, his wife's son by a former husband, who had been living with them about eighteen months, and a companion, accused him of committing the crime of sodomy, and told him that unless he paid them the sum of \$1,000 each, and conveyed to his wife one half of his real property, they would cause criminal proceedings to be instituted against him for the alleged crime; that, thinking he could secure the arrest and conviction of these persons, he left home on January 25, with his brother Joseph, and on the thirtieth day of that month he and his brother Andrew visited Albany, Oregon, and consulted attorneys, who informed them that the remedy which they sought as a punishment for the wrong inflicted was not adequate to the character of the injury sustained; that one of the attorneys so consulted, believing that Lowell had been imposed upon by his stepson and the confederate, probably in his employ, and thinking that a repetition of such threats might induce him to part with his property, suggested to him the propriety of making a will, and also of instituting an inquest of lunacy and the appointment of a guardian; that in pursuance of such advice the will was thereupon prepared, signed, witnessed, and published; and Lowell also petitioned the county court of said county to appoint a guardian of his person and estate, stating therein that his health was bad, that he was feeble in body, and at times his memory was poor, that certain persons were endeavoring to impose upon, cheat, and defraud him out of his property, and that they had materially injured his estate, that it would be for the best interests of his property, and conducive to his health, to be relieved of the burden of caring for his estate,—

and prayed that his brother Andrew might be appointed guardian thereof; that said court on January 30, 1899, made an order reciting the facts stated in said petition, and appointing Andrew guardian of his person and estate; that, an undertaking as such guardian having been given, letters of guardianship were issued April 7, 1899; that, after executing said will, Lowell returned the same day to Lebanon, and the next day his wife took him home. On February 1, 1899, his brothers, Andrew and Joseph, persuaded him again to leave home, and took him to a hotel at Sweet Home, near which he lived, where he remained about two weeks, and then went to and remained with Mrs. Hester Ames, a sister-in-law, until April 10, 1899, when he was taken home, and six days thereafter died.

Lowell was a member of the Church of Latter-day Saints, and occasionally muttered and talked to a picture of Joseph Smith, the founder of the Mormon faith, which hung in his house, believing that Smith, though dead, possessed the "keys of the kingdom," and could hear and understand what was said to him. Lowell was a constant reader of literature of that church, and could repeat many passages from the Book of Mormon, and from other books which he had read when younger; but for several years prior to his death he had been in failing health, and his memory of the every-day affairs of his later life was not retentive. For seven or eight years prior to executing the said will it was his habit to talk to himself when pursuing his ordinary occupation, and he would occasionally become very much excited, in speaking of which the contestant testified as follows: "He was not insane all the time, but his mind was weak as his body, and when he would get anything to worry him, it would worry his mind, and when he would be walking out he would be cracking his fists together like a crazy man." This statement is corroborated in some degree by the testimony of A. M. Cannon, an attorney at Albany, Oregon, who was consulted by Lowell and Andrew in respect to the conduct of George Knable. Cannon says, in effect, that Andrew conducted the conversation, while Lowell

sat with bowed head, and his hands resting upon a cane. This witness, in speaking of the interview, testified in respect to Lowell's apparent interest therein as follows: "The old gentleman sat and listened, or seemed to, part of the time. Part of the time he didn't; and I questioned him concerning the conduct of this young man,—that is, Lowell,— and whenever he spoke of him he fired up at a great rate and became very demonstrative, and denounced him in unsparing terms. Said he was afraid of him." This witness, referring to the testator's mental disturbance when referring to the accusation made against him, testified as follows: "I wanted to get the facts in the case. He became very excited at these times, clenched his fists, and was very demonstrative." The attesting witness Newport, in speaking of Lowell's mental capacity at the time the will was executed, testified as follows: "I thought he was capable of making a will, or, of course, I would not have written it. He claimed that he was feeling bad, both from the condition of his health, and from the worry over what had been done up there. He claimed his home was broken up, and they were trying to get his property, claimed he was hardly able to be up to them." Testimony of this witness fairly illustrates the opinion of most of the other witnesses called upon this branch of the inquiry. Lowell and his brother Andrew first consulted Cannon, Newport's partner in the practice of law, about the accusation made by Knable and his confederate against Lowell, and their demand upon the latter, which, if complied with, was to afford the consideration of their agreement not to prosecute him. In this interview Andrew conducted the conversation, while Lowell seemed to take no part therein. But when Cannon suggested the making of a will, Andrew remarked this was not necessary, as all that was desired was to get rid of Knable, who was annoying his brother, whereupon Cannon advised the appointment of a guardian, so that some person could protect Lowell and his property. Lowell assented to these suggestions, whereupon Andrew and Cannon immediately left the office, and Lowell conferred with Newport about making the will, telling him of his

property, and giving him the names of the persons upon whom he wished to bestow it. Newport testified that Lowell told him that the Annie Ames to whom he bequeathed the sum of \$500 was the daughter of a deceased brother, while the testimony shows that she is the daughter of his sister. Newport also says that the testator being unable correctly to describe his real property, they had to get a list thereof from an abstract company.

The appointment of a guardian of a person alleged to be *non compos mentis*, by a court having jurisdiction, must necessarily create a presumption of the mental infirmity of the ward; but such decree does not conclusively show that the testamentary capacity of the person under guardianship is entirely destroyed, and the presumption thus created may be overcome by evidence proving that such person at the time he executed a will was in fact of sound and disposing mind and memory: *Stone v. Damon*, 12 Mass. 487; *Breed v. Pratt*, 18 Pick. 115; *In re Slinger's Will*, 72 Wis. 22 (37 N. W. 236). The order of the county court appointing Andrew guardian of the person and estate of Lowell, though made on the same day, but after the will was executed, was so nearly related to the making of the will as to impose upon the proponent the burden of overcoming the presumption created by the decree of said court, and of establishing the testamentary capacity of Lowell on January 30, 1899.

3. The testimony shows that the guardian was appointed to prevent George Knable from taking advantage of his stepfather by extorting money or property from him under threats of a criminal prosecution. The petition for the appointment does not allege that Lowell was insane, but it avers, and the order of the county court recites, that he was in ill health, feeble in body, and at times his memory was poor. The testimony shows that the testator retained a vivid recollection of the contents of the books he had read and studied when he was young, but that he could not readily recall to his mind the ordinary incidents of his later life. The depth and intensity of mental impressions always depend upon, and are

measured by, the degree of attention given to the perception of facts, which requires observation, or to the conception of truths, which demands reflection; and hence the inability of a person to recollect events occurring recently is evidence of mental decay, because it manifests a want of power of concentration of the mind. The aged live in the past, and the impressions retained in their minds are those that were made in their younger days, because at that period of their lives they were able to exercise will power by giving attention. While the inability of a person of advanced years to remember recent events distinctly undoubtedly indicates a decay of the human faculties, it does not conclusively establish senile dementia, which is something more than a mere loss of mental power, resulting from old age, and is not only a feeble condition of the mind, but a derangement thereof. In *Eddy's Case*, 32 N. J. Eq. 701, it was held that mere forgetfulness of recent events in a testatrix eighty-three years old, afforded no evidence of incapacity to make a will. In *Clark's Heirs v. Ellis*, 9 Or. 128, the will of a testator about seventy years old was upheld, notwithstanding his memory was faulty, in speaking of which Mr. Chief Justice LORD says: "It is true that the testimony of two or three of the witnesses indicates that his memory was failing, but this was to be expected in one of his age, and might be said of a multitude of old men whose competency for any business is never questioned." The rule is settled in this state that if a testator at the time he executes his will understands the business in which he is engaged, and has a knowledge of his property, and how he wishes to dispose of it among those entitled to his bounty, he possesses sufficient testamentary capacity, notwithstanding his old age, sickness, debility of body, or extreme distress: *Hubbard v. Hubbard*, 7 Or. 42; *Clark's Heirs v. Ellis*, 9 Or. 128; *Chrisman v. Chrisman*, 16 Or. 127 (18 Pac. 6); *Luper v. Werts*, 19 Or. 122 (23 Pac. 850); *Franke v. Shipley*, 22 Or. 104 (29 Pac. 268); *In re Cline's Will*, 24 Or. 175 (33 Pac. 542, 41 Am. St. Rep. 851)*; *Swank v. Swank*, 37 Or. 439 (61 Pac. 846).

*NOTE.—Testamentary Capacity as Affected by Insane Delusions or Old Age—Test of Capacity.

4. Under this rule, we think Lowell Ames, at the time he executed the will in question, possessed testamentary capacity. Because he talked to a picture and expressed the belief that the departed person thus represented possessed the "keys of the kingdom," and could hear and understand what was said to him, does not necessarily imply lunacy; for, if such were the case, it might with equal reason be claimed that many persons who worshiped different personages were *non compos mentis*.

5. It is contended by contestant's counsel that if Lowell, at the time he executed the pretended will, was not wholly lacking in testamentary capacity, he was, in consequence of age, ill health, debility of body, and infirmity of will power, susceptible to persuasion by his friends, and that his brothers, Andrew and Joseph, having knowledge thereof, took advantage of his physical and mental condition, and unduly influenced him to devise and bequeath his property in the manner indicated, attempting thereby to deprive the contestant of all interest therein except such as was given her by statute. These brothers testified that they never in any manner attempted to persuade or even advise the testator to execute a will, or knew that he intended to make a testamentary disposition of his property until at Cannon's suggestion he did so; and their testimony in this respect is not contradicted in any manner. After the will was executed the testator went with his brothers to a hotel, and refused to return with the contestant, saying he was afraid of his stepson, and would not return until he left their home, whereupon she told her husband that, if he would pay her son for eighteen months' labor which he had performed, she would send him away. When the testator was taken home, a nurse was secured, who administered his medicine and prepared his food in his presence, or it was cooked by his neighbors and brought to him; contestant not being called upon to cook for or wait upon him in his last sickness, he claiming to be afraid of being poisoned. The testator on February 17, 1899, commenced a suit against the contestant for divorce on the ground of cruel and inhuman treatment, in

that she, against his wish, suffered her son to abuse him, and confederated with her son to extort property and money from him under a threat of prosecution for the commission of a heinous offense. A plea having been interposed by the contestant showing that the testator had been adjudged insane, the court on March 13, 1899, decreed that the suit abate. Joseph testified that he never said anything to Lowell about his wife's poisoning him, but did tell him that he was in danger from her son. Andrew, in answer to the inquiry, "What, if anything, did you say to Lowell Ames in his lifetime to influence him against his wife, Mary Ames?" said: "Why, I don't recollect saying anything in particular. Q. Did you ever say anything at all, particular or otherwise? A. No. Q. What attempt, if any, did you make to influence him against his wife? A. I never tried to influence him at all." It would seem to be inferable, however, from the testimony of the last witness, who was in fact cross-examined by his own counsel, that, after the will was executed, the brothers and the persons employed by them to assist in caring for Lowell tried to prejudice his mind against his wife, and to prevent her from conversing with him unless some one else was present. The contestant testified that, on the night preceding his death, she, in response to his request, went to his bedside, and, in answer to the question, "What was said?" she replied: "He says, 'Mary, they tell me you have gone back on me.' I says, 'Who?' He says, 'The Rowells.' I says, 'Did you believe it?' He says, 'I did at the time, but now I don't.' " The Rowells referred to kept the hotel at Sweet Home, where the testator was taken by his brothers when he first left home. After his return the nurse found a bottle in his house marked, "Poison," which she showed him, and he remarked that he never knew that there was any poison on the place. Assuming that he was easily persuaded, and that his brothers and the persons employed by them to care for him took advantage of his enfeebled condition and prejudiced his mind against the contestant, did such undue influence render the will theretofore executed void? The purpose to be subserved in considering evi-

dence of the conduct of these parties after the will was made is to determine whether their influence was exerted in procuring the execution of the testament; for it is reasonable to suppose that, since the mind of the testator was prejudiced against the contestant after the will was made, undue influence was exercised by the brothers in persuading the testator to execute a will in conformity with their wishes. The testimony shows that when the will was made the testator did not think the contestant was a party to the scheme of her son to extort money and property from him. He stated, however, that he would expend all his property in employing lawyers, rather than that George Knable should secure one cent of it. The will having been made when he thought his wife innocent, the purpose of his testamentary disposition of his property was not to punish her, but to prevent her son from securing from her any part of his estate. Andrew thought the contestant was trying to secure her husband's property by the means adopted by her son, and so told Newport and Cannon; but as neither he nor his brother Joseph had any knowledge that Lowell intended to make a will, or that the testator even thought of doing so, until such course was suggested by Cannon, we cannot think that the influence relied upon superinduced the execution of the will. When a will has been properly executed, it is the duty of the courts to uphold it, if the testator possessed a sound and disposing mind and memory, and was free from restraint and not acting under undue influence, notwithstanding sympathy for persons legally entitled to the testator's bounty and a sense of innate justice might suggest a different testamentary disposition.

Believing, as we do, that the findings of the circuit court are supported by the weight of the testimony, its decree is affirmed.

AFFIRMED.

Argued 30 January; decided 17 February, 1902.

SUTTON v. CLARKE.

[67 Pac. 742.]

REFERENCE—FINDINGS MUST BE ON MATERIAL ISSUES.

A referee should make findings on all the material issues tendered by the pleadings, and should not make findings on matters not put in issue.

From Douglas: JAS. W. HAMILTON, Judge.

Action by B. B. Sutton against W. B. Clarke and J. L. Baker, partners doing business under the firm name of Clarke & Baker. From a judgment in favor of plaintiff, defendants appeal. **REVERSED.**

For appellants there was a brief and an oral argument by *Messrs. Wm. R. Willis and Dexter Rice.*

For respondent there was a brief over the name of *Coshow & Sheridan*, with an oral argument by *Mr. O. P. Coshow.*

MR. CHIEF JUSTICE BEAN delivered the opinion.

This action to recover money was commenced July 1, 1899. The complaint contains three separate causes of action. In the second it is alleged that on or about the seventh of March, 1899, the plaintiff sold and delivered to the defendants 99,112 feet of saw logs at the agreed price of \$2.50 per M; that they promised and agreed to make the first payment therefor as soon as 10,000 feet of such logs should be sawed into lumber and sold, and installments thereafter as fast and as soon as other lots of 10,000 feet should be sold by them; that they had sawed and sold more than 10,000 feet, and a reasonable time had elapsed in which they could have sawed the remainder; that no payments have been made on the purchase price of such logs, except the sum of seventy cents; and that there is now due, owing, and payable to the plaintiff on account thereof the sum of \$247.08. The answer admits the sale and delivery of the logs, but denies that they were to be paid for in

installments, and avers that they were sold on credit until the first of January, 1900. For a further and separate defense to the second cause of action, it is alleged that on the twenty-seventh of September, 1897, the plaintiff and defendants entered into an agreement in writing wherein and whereby it was stipulated and agreed that the plaintiff should sell and deliver to the defendants at their mill in Douglas County 100,000 feet of merchantable logs on or before the first of March, 1898, for which he should be paid \$2.50 per M on or before the first day of January following; that defendants have been ready and willing at all times to receive such logs and to pay for same according to their agreement, but that plaintiff has failed and refused to deliver them, or any part thereof, to defendants' damage in the sum of \$300. The reply put in issue the new matter alleged in the answer. By stipulation of the parties, the cause was referred, and the referee in due time made the following findings: "(7) I find that on September 27, 1897, these parties entered into an agreement by which the plaintiff was to deliver to the defendants 100,000 feet of merchantable logs, said to be delivered at the mill pond at the boom of defendants' mill on or before March 1, 1898, and the further amount of 80,000 feet in the same manner on or before March 1, 1899, at the agreed price of \$2.50 per thousand feet, to be paid as follows: For the first 100,000 feet on or before January 1, 1899, and for the 80,000 feet on or before the first day of January, 1900. (8) I find that plaintiff between the first part of November, 1897, and the seventh day of March, 1898, cut and put into the creek and on the bank of the creek above the mill of defendants about 100,000 feet of logs; that the water of the creek did not raise sufficiently to float the logs, except a few small ones, during the winter, and but a few thousand feet were delivered according to the contract; that during the winter of '98 and '99 the logs came down the creek, arriving at the boom of defendants' mill March 7, 1899. (9) I find that no effort was made by plaintiff to complete the contract, but that after the logs came down to the mill in 1899 it was practically

agreed between the parties that no further amount of logs should be delivered under the contract. (10) I find that the only reasonable mode of delivering the logs under the contract was by way of the creek; that the defendants acquiesced in the action of the plaintiff in attempting to deliver the logs by the creek. I find that the plaintiff had a cause of action at the time of the commencement of this suit." As conclusions of law, he found in favor of the plaintiff for the sum of \$308.15. A motion to set aside the report on the ground that the referee did not find on all the material issues tendered by the pleadings being overruled, a judgment was rendered in favor of the plaintiff, from which the defendants appeal.

So far as the questions presented on this appeal are concerned, the two issues made by the pleadings are (1) whether the purchase price of the logs delivered by the plaintiff to the defendants in March, 1899, was due at the commencement of this action; and (2) what amount of damages, if any, the defendants sustained by the breach of the contract to deliver 100,000 feet of logs before the first day of March, 1899. The answer admits the delivery of the logs in March, 1899, as alleged in the complaint, but avers that they were not to be paid for until the first of the following January, some months after this suit was begun; thus presenting an issue of fact which does not seem to have been passed upon by the referee. As a counterclaim or offset, the answer also avers, in substance, that, as a part of the contract under which the logs mentioned in the complaint were sold and delivered, the plaintiff agreed to deliver to the defendants at their mill on or before the first of March, 1898, 100,000 feet of logs, which he failed to do, whereby they were damaged in the sum of \$300. The referee practically finds that the logs were never delivered as agreed upon, but seems to have deemed it unnecessary to find upon the question of damages, because performance of the contract was waived, or because such performance was impossible, for want of sufficient water to float the logs to the mill. But these matters are not pleaded as a defense to the counterclaim, nor as an excuse for a failure to perform the contract. They were

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both, therefore, immaterial questions, under the pleadings, and could not properly form the basis of a judgment. It is the duty of a referee, in a case of this kind, to find on all the material issues made by the pleadings: 20 Am. & Eng. Ency. Law (1 ed.), 697. For a failure to do so in this instance, the motion to set the report aside ought to have been allowed.

The judgment will therefore be reversed, and the cause remanded for a new trial. **REVERSED.**

Argued 28 July; decided 18 August, 1902.

HICINBOTHEN v. INTERSTATE LOAN ASSOC.

[69 Pac. 1018.]

CONTRACTS OF FOREIGN CORPORATIONS—WHAT LAW GOVERNS.*

A contract between a resident citizen of Oregon and a foreign corporation having a local agent in this state, concerning Oregon land, is an Oregon contract, and should be construed according to the laws and court decisions here, though the principal and interest are in terms payable at the home office of the corporation, and it has for the convenience of its patrons sent to such local agent for collection the receipts for the amounts due under the contract, and though the contract contained a distinct agreement that it should be construed in accordance with the laws of the home state of corporation: *Washington Invest. Assoc. v. Stanley*, 38 Or. 319, and *Pacific Build. Co. v. Hill*, 39 Or. 280, followed.

From Multnomah: **ARTHUR L. FRAZER**, Judge.

This is a suit by William Hicinbothem against the Interstate Savings and Loan Association to compel the cancellation of a mortgage on the ground that the amount secured thereby, with legal interest, has been paid, and comes here on appeal from a decree sustaining a demurrer to the answer and granting the relief prayed for. From the pleadings it appears that the defendant is a Minnesota corporation, organized for the purpose and with the power of conducting the business of a general co-operative building and loan association. On October 1, 1892, one Edwin Joost, a resident of this state, applied to the association for a loan of \$1,000 on certain real estate

*NOTE.—See 54 Cent. Law Jour. 223, for an article, Enforcement of Contracts Valid Where Made, but Contrary to the Public Policy of the State of the Forum.

in Portland, through William Irle, who was its agent here, "authorized and empowered by it to take applications for loans and to forward them" to its home office in Minneapolis, but without authority "to accept applications for loans, or to make any loans for or in behalf of the defendant." He also applied, at the same time, for ten shares of its capital stock, of the par value of \$100 each, agreeing to pay therefor in monthly installments of sixty cents a share until the stock "shall attain the par value of \$100 per share." It was stated in the application that all payments on stock should be due and payable at the home office of the company, "but, for the convenience of members, the association sends for collection to the local bank or treasurer the monthly installment receipts." Irle forwarded Joost's application for a loan and subscription to the capital stock to the home office of the company, where they were approved by the proper officers October 6, the stock was issued, and the loan ordered made. On October 11, Joost executed his promissory note in favor of the defendant, which was dated at Minneapolis, Minnesota, but was in fact made at Portland, Oregon, agreeing to pay the company at its office in Minneapolis, on or before the maturity of the stock issued to him, the sum of \$1,000, with interest thereon at the rate of six per cent. per annum, and seven per cent. premium per annum, both interest and premium payable monthly. To secure the payment of the note, he transferred and delivered to the defendant his stock as collateral security. He also executed at Portland a mortgage to the defendant on the real property described in his application, to secure the payment of the loan, interest, and premium; the monthly payments to become due on the stock, insurance, taxes, etc. Among other stipulations in the mortgage, was a covenant and agreement that it and the note secured thereby were made and executed under, and should be construed in accordance with, the laws of the State of Minnesota and the articles of incorporation and by-laws of the defendant, "anything in the laws of any other state or territory, to the contrary, notwithstanding; and any provision whatever, in the laws of any other state

or territory, at variance with the law of the State of Minnesota, either on the subject of interest, premium, or any other matter, is hereby waived." On May 17, 1895, Joost and wife conveyed the mortgaged premises to one Henkle. He in turn conveyed them to plaintiff, who assumed and agreed to pay to the defendant the balance due on the indebtedness. Payments were regularly made on the stock and note as agreed upon until January 1, 1900, the total amount of which it is admitted, as we understand the record, was sufficient to pay the full amount of the loan, with legal interest.

Messrs. Carey & Mays for appellant made this point in their brief:

This is a case of a building and loan association mortgage, made before any law regulating such associations was adopted in Oregon, and made by its express terms payable at Minneapolis, Minnesota, where the contract was strictly within the provisions of statute law. No charge of fraud or intention to evade the laws or policy of the State of Oregon is in the case. The simple question on the demurrer is whether a *bona fide* contract to be performed in another place may provide for the payment of a legal rate of interest at that place greater than could be legally collected where the contract is made. We rely upon *Bedford v. Eastern B. & L. Assoc.* 181 U. S. 227 (21 Sup Ct. 597); and *McIlwaine v. Ellington*, 111 Fed. 581 (55 L. R. A. 933).

Mr. William Reid for respondent made this point in his brief:

The appellant, as is shown by the allegations of its answer, was doing business in the State of Oregon at the time the contracts in question herein were made and executed, and therefore this case comes clearly within the rule announced in the case of *Pacific Build. Co. v. Hill*, 40 Or. 280 (67 Pac. 103).

MR. JUSTICE BEAN, after stating the facts, delivered the opinion of the court.

That the contract between Joost and defendant was usurious under the laws of this state is conceded: *Washington Invest. Assoc. v. Stanley*, 38 Or. 319 (63 Pac. 489, 84 Am. St. Rep. 793); *Pacific B. Co. v. Hill*, 40 Or. 280 (67 Pac. 103). The position of the defendant is, however, that the contract should be construed according to the laws of Minnesota, where it is valid, and not according to the laws of this state. There is some diversity of opinion whether a contract of a foreign building and loan association, such as the one now under consideration, that is not usurious under the laws of the state where the corporation is organized and domiciled, and where the obligation is made payable, can be attacked for usury in the courts of the state of the borrower's residence, where the contract was actually made, and the mortgaged premises are situated; but, by the great weight of authority, the validity of such a contract is solvable by the law of the place where it was made, and not where payable. The law governing these associations, and by which their contracts are to be construed, is so thoroughly considered by Mr. Justice WOLVERTON, in the Stanley and Hill cases, that nothing more need be said upon the subject, although it may be proper to note that the same conclusion has recently been reached by the Supreme Court of Mississippi, in an exhaustive and masterly opinion by Mr. Chief Justice WHITFIELD: *National Mut. B. & L. Assoc. v. Brahan* (Miss.), 31 South. 840. The case now under consideration cannot be distinguished on principle from the *Hill Case*, the contracts in both being made before the passage of the act of 1895 (Laws, 1895, p. 103) regulating the business of building and loan associations. The fact that the plaintiff in the *Hill Case* had made loans to other citizens of Oregon, had a local advisory board composed of citizens of the state, and exacted from borrowers a bid of fifty per cent. of their stock, to be assigned to the company, does not differentiate it from the present case. Such circumstances only went to show, and were alluded to by the court as evidence, that the com-

pany was in reality doing business in Oregon, and that the agreement between it and Hill was not an isolated instance of a nonresident making a contract with a citizen of this state, to be performed elsewhere. So, too, here, while the defendant did not have a local advisory board, and it does not appear that it had in fact made loans to other persons, it is averred that it had a resident agent here, with authority "to take applications for loans, and forward them to the home office," and, although it was stipulated that all payments on stock, premiums, and interest were due and payable at the home office, it did, "for the convenience of its members," send, "for collection, to the local bank or treasurer, the monthly installment receipts." In short, it was doing, or offering to do, a general loan and savings business in the state, of like character with that of the plaintiff in the *Hill Case*. *Bedford v. Eastern B. & L. Assoc.* 181 U. S. 227 (21 Sup. Ct. 597) was a suit in the United States court to foreclose a mortgage on land in Tennessee in favor of a foreign building and loan association, and the Supreme Court of the United States very naturally followed the decisions of the Tennessee courts, holding that such a contract was solvable by the laws of the state where the company was domiciled and the contract made payable.

We are of the opinion, therefore, that the decree of the court below must be affirmed, and it is so ordered. **AFFIRMED.**

Decided 10 February, 1902.

GOHRES v. ILLINOIS MINING COMPANY.

[67 Pac. 666.]

MINES—EFFECT OF EXCESSIVE LOCATION.

1. An excessive location of mining ground, made through mistake and in good faith, is void only as to the excess.

MINING LOCATION—LOCATING EXCESS.

2. Where a mining location was greatly in excess of the statutory limit, and the locator, on attempting to sell the same, discovered that there was an excess, and procured a third person to locate a certain part of the original tract in his own name for the purpose of making a conveyance, such action was an assertion as to where the excess in the original location lay, so that, on its appearing that the location by such third person was void, a subsequent locator was entitled to claim that portion of the original location as excess.

ASSESSMENT OF DAMAGES BY THE COURT—STATUTES.

3. Under Hill's Ann. Laws, § 249, subds. 1 and 2, providing that, in an action sounding in tort, when the defendant has failed to answer, the court shall assess the damages (which is by Section 404 made applicable to suits in equity), it is the duty of the court to assess the damages after taking testimony, even though the defendant has answered without denying the allegation as to the amount of damages.

From Josephine: **HIERO K. HANNA**, Judge.

Suit by **W. J. Gohres** against the **Illinois & Josephine Gravel Mining Company**, in which plaintiff had a decree as prayed for, and defendant appeals. **MODIFIED AND AFFIRMED.**

Messrs. H. D. Norton and Wheaton & Kalloch for appellant.

Mr. Robert G. Smith for respondent.

MR. JUSTICE WOLVERTON delivered the opinion.

Plaintiff, as a citizen of the United States, claiming to be a locator, owner, and entitled to, and in the actual possession of, a certain placer mine, triangular in form, described in the complaint is situated about one and one quarter miles above the junction of Josephine Creek and Illinois River, on what is known as "Mud Flat," adjoining Day's Gulch, in Josephine County, commencing at a monument of rock on the west bank

of Josephine Creek, three hundred yards below the mouth of Day's Gulch, running thence along said creek in a northeasterly direction fifteen hundred feet to a monument of rock; thence in a northwesterly direction six hundred feet to a monument of rock; thence in a southwesterly direction fifteen hundred feet to the place of beginning,—seeks to have his title quieted as against certain deeds through which defendant claims to have acquired title from Alex George and W. H. Little, as original locators of the *locus in quo*. It is alleged, in substance, that neither George nor Little ever properly located said mine, or acquired any interest therein, and were without right or authority to convey the same; and plaintiff seeks, also, to restrain defendant from discharging any earth, rock, gravel, or other mining debris upon said claim. Plaintiff had a decree for the relief demanded in the trial court, and the defendant appeals.

It may be taken as conceded that plaintiff's location of the claim in controversy is valid and sufficient, under the United States mining laws, to entitle him to possession, and to maintain this proceeding to restrain defendant from depositing debris from its mine thereon, provided the claim was laid upon unappropriated public lands. The defendant claims title through William H. Little, and contends (1) that Little himself acquired title and right of occupancy direct from the government; and (2) that Alex George located a claim comprising, for all practical purposes, the one in dispute, and that Little acquired title from him, and conveyed to Alex Watts, who conveyed to the defendant. To sustain the first contention, defendant produced a notice of location whereby Little claims to have located on the day of its date, October 8, 1894, fifteen hundred linear feet of placer-mining ground upon what is known as "Mud Flat," described as follows: Commencing at a stake No. 1 on Josephine Creek, running northeast to stake No. 2, seven hundred and fifty feet; from stake No. 2, running northwest to stake No. 3, six hundred feet; from stake No. 3 to stake No. 4, running southwest fifteen hundred feet; from stake No. 4 to stake No. 5 southeast six hundred feet,

from stake No. 5 to stake No. 1, seven hundred and fifty feet. This notice was filed in the county clerk's office for Josephine County, Oregon, October 10, 1894, and recorded the following day. The description, computed from the distances there given, would contain a fraction over twenty acres. However, for the exact determination of the amount of land claimed to be comprised within the boundaries designated by the notice, survey was made upon the ground, and a plat drawn and introduced in evidence. This contains a description as follows: Commencing at Watts' southeast corner (referring to a mining claim), running thence north, nine and one-half degrees west, twenty and forty-three one-hundredths chains; thence north, forty-nine degrees forty minutes east, twenty and sixty-four one-hundredths chains; thence south, twenty degrees forty-five minutes east, seven and ninety-three one-hundredths chains; thence south, four degrees thirty-five minutes west, six chains; thence south, twenty-two and one half degrees west, eleven and eighty-two one-hundredths chains; thence south forty-seven and one half degrees west, thirteen and fifty one-hundredths, to the place of beginning,—containing thirty-four and fifty one-hundredths acres. This survey includes substantially all the plaintiff's claim.

Little testifies that at the time of the location of his claim, in 1894, he established a monument at the initial point, as shown by the survey and plat, consisting of a wooden post four or five inches square and five or six feet high, and a like monument at each of the corners or points of diversion from a right line,—five in all. These monuments he describes on the plat as beginning with the initial point, as there designated, and running in the inverse order of the survey, as one south, two south, three south, etc., up to five south, which, he seems to maintain, is the identical order of location on the ground, and designated in his notice of location. It is readily discernible, however, that the description in the notice of location and the one exhibited by the survey are so dissimilar that they would never be taken one for the other without a positive declaration that they were the same; and even then one is led to

doubt whether the declaration was intended to be taken seriously. Taking the description contained in the notice of location, and Mr. Little's testimony whereby he designates the initial or starting point for setting his stakes or establishing the monuments as in the center of the line bordering upon Josephine Creek, it becomes apparent that he is mistaken when he fixes the initial monument at the extreme southwest corner of the plat, or, as otherwise designated, at Watts' southeast corner. Aside from this, there is evidence in the record tending strongly to show that in 1897 Little claimed location for his monuments essentially different from those now designated on the plat, throwing his claim much further to the north, and quite beyond the claim of plaintiff according to positive measurement; so that, from the manner of location, and the evidence adduced touching the initial point, there remains in any event, much doubt and speculation as to where the excess of Little's location should be settled.

1. Where an excessive location has been made through mistake, while acting in good faith, as where the locator sets his stakes and estimates his distances without chain or compass, it is void only as to the excess. This rule is of general application, except, it may be, where the excess is so large as to give rise to an inference of bad faith: 1 Lindley, Mines, § 362; *Richmond Min. Co. v. Rose*, 114 U. S. 576 (5 Sup. Ct. 1055); *Glacier M. S. Min. Co. v. Willis*, 127 U. S. 471 (8 Sup. Ct. 1214).

2. Ascribing to Mr. Little an honest intention of keeping within the statute, and acquitting him of any purpose of locating more than twenty acres, it must be noted that he frankly admits that his location was excessive by fourteen and fifty one-hundredths acres. Indeed, the very plat made under his and defendant's direction, and which defendant offers in evidence, proves it. He became aware in August, 1897, if not before, that his location was excessive, and that he could not convey a satisfactory title to the whole. One Brown was trying at that time to effect a purchase of the claim, with others, and James Stith was engaged in bringing about the sale; but

in the examination thereof they discovered that it was much larger than Little was entitled to purchase from the government, and so informed him, whereupon it appears that he and plaintiff agreed that the excess should be located in Alex George's name, and, in pursuance of the agreement, plaintiff wrote out a notice of location, describing the claim, and signed George's name to it as locator, and his own as witness. Little also witnessed the document. This notice was filed and recorded at the instance of Little. Very soon afterwards,—August 7, 1897,—George executed a deed of said claim to Little. On the third of November, 1898, plaintiff perfected his location and was in possession, but it was not until the seventeenth that Little deeded to Watts. On June 26, 1899, Watts conveyed to the defendant; and two days later Little made another deed for the premises in dispute, along with his own mine, to the defendant, direct. In reality, George never made any location by erecting monuments, or otherwise designating his claim so that its exterior limits might be traced on the ground. The simple execution of the notice in the manner stated, and the recording of the same, were all that was done. Little was cognizant of all this, and accepted a deed to the George claim as though there had been a valid location, and executed two deeds to the premises, as has been indicated,—one to Watts, and the other to the defendant,—covering George's pretended claim by the description adopted in the pretended location. By these acts and representations Little has, by positive assertion, unequivocally indicated where the excess of the original location was, and has thereby precluded himself and those claiming under him from shifting it to another segment thereof. Such acts and representations were effective to render that certain and definite which was before existing much in his mind as to his primary intention, in the absence of a discovery shaft or positive designation of his initial point. His title, or that of the defendant, to the excess, therefore, is entirely dependent upon George's location; and, as he made none, he acquired no title to convey, and the defendant has-acquired none.

The plaintiff would seem not to be altogether blameless in bringing about the condition, for he agreed with Little to locate the claim in George's name; but, whatever understanding or agreement he might have had at the time, it was not consummated by an actual or valid location, and he subsequently, by his positive act, renounced it. This he did by making a location of his claim almost entirely within the supposed boundaries of George's pretended location. Little was cognizant of this, and openly objected to it, but he subsequently recognized its validity by seeking and obtaining plaintiff's consent to mine upon the premises. This was done through the agency of one Marston, with whom Little was working in co-partnership. The consent was obtained, however, after Little had executed his deed to Watts of the pretended George claim; but Marston and Little at that time had Watts' claim leased, and were working it, and, if Watts was claiming under the George location, it would be useless to seek and obtain the permission of plaintiff to work upon his claim. Watts would have been the proper person to have granted the permission. The circumstance goes to show that George's location was not looked upon or treated seriously at that time. Defendant's subsequent purchase was long after the occurrence of these incidents, and while plaintiff was in open possession, so that it must have purchased with notice of his claim, title, and right of possession. The question, therefore, resolves itself to a strict legal right, dependent upon the better title; and plaintiff, having that, must prevail.

3. It is scarcely controverted that defendant had been for some time before the commencement of this suit discharging quantities of rock, coarse and fine gravel, and other debris upon the mine of plaintiff. The deposit by some of the witnesses is described as covering in extent about two acres to a depth of from twelve inches to five or six feet. Others seem to think it is much less in magnitude. In any event, the plaintiff is entitled to an injunction restraining the defendant from further discharging debris and refuse from its mine upon his premises. The complaint contains an allegation, in effect,

that the discharge of such debris upon his mining claim has impaired its value, and will necessitate great expense in removing the same, and greatly interferes with plaintiff's mining operations, to his damage in the sum of \$500. This was practically undenied by the answer, for which reason the court below treated the amount of damages as confessed, and gave a decree for \$500 therefor; being the full sum claimed. The defendant complains of the decree in this particular, and assigns error. It insists that the allegation was not issuable, and therefore that the court should have heard evidence, and determined the fact of damages therefrom, notwithstanding the allegation remained unanswered. Our statute provides that, where the defendant has failed to answer the complaint, the plaintiff shall be entitled to have judgment against him for the amount specified in the summons in an action arising upon contract for the recovery of money or damages only, but in all other actions, including those sounding in damages or tort, as opposed to an action for debt, if no answer has been filed, the clerk shall, upon written motion of the plaintiff, enter the default of defendant, and thereafter the plaintiff may apply for the relief demanded in the complaint; and in all such cases, where the judgment is rendered otherwise than on verdict in favor of the plaintiff, the court shall, without the intervention of a jury, assess the damages which he shall recover, and to this end may hear proof itself, or make an order of reference to take and report the testimony: Hill's Ann. Laws, § 249, subds. 1, 2. This is applicable as well to suits in equity: Hill's Ann. Laws, § 404. We think the scope, spirit, and purpose of this section rendered it incumbent upon the trial court to hear the testimony and proofs offered, notwithstanding there seemed to be a confession of the amount of damages alleged, and determine therefrom what amount of injury plaintiff has sustained by reason of the discharge of debris and other deposits upon his claim. We have, therefore, considered the evidence contained in the record as to such damages, and have concluded that \$100 is a fair estimate.

The decree of the trial court will therefore be modified in

this respect, but in all others affirmed, and the defendant will be awarded its costs and disbursements on appeal. MODIFIED.

Argued 13 January; decided 15 April, 1901.

U. S. INVESTMENT CORP. v. PORTLAND HOSPITAL.

[56 L. R. A. 627, 64 Pac. 644, 67 Pac. 194.]

40	523
43	545
40	523
44	375

APPEAL—SERVICE OF NOTICE ON PARTIES IN DEFAULT.

1. The amendment of Section 537 of Hill's Ann. Laws, by the act of 1899, regulating the method of taking appeals to the supreme court (Laws, 1899, p. 228), was intended to modify the existing statute by relieving the appellant from the obligation of serving the notice of appeal on adverse parties who have not appeared, and now the notice need be served on only those parties who have appeared.

RELATIVE RANK OF MORTGAGES AND RECEIVER'S DEBTS.

2. Primarily, a receiver is a specially appointed officer of the court whose duty is to preserve the property involved until the litigation shall be ended, and the expenses incurred in so doing, together with a reasonable compensation, constitute a first charge on the property and its income; but other debts of a receiver will not be preferred to prior contract liens unless such preference is given in the order authorizing the obligation to be incurred or in the order approving and ratifying it.

POWER TO MAKE RECEIVER'S DEBTS A PREFERRED LIEN.*

3. In appointing receivers of corporations not *quasi* public in character, or authorizing their receivers to continue the business of such corporations, courts of equity cannot, without the consent of prior lien creditors, decree that the debts of such receivers incurred in carrying on the business of the defendant corporation shall take precedence over prior contract liens: *McCornack v. Salem Ry. Co.* 34 Or. 543, and *Merriam v. Victory Min. Co.* 37 Or. 321, approved and followed.

RECEIVERS—PRIORITY OF RECEIVER'S DEBTS.

4. The fact that a receiver of a private corporation has made an inequitable application of part of the income from the property of the defendant does not change the relative rights of any interested party, or give the creditors of the receiver precedence over mortgage creditors of the defendant whose rights had been fixed before the receivership.

***Receiverships of Quasi-Public Corporations.**

RELATIVE RANK OF MORTGAGES AND UNSECURED DEBTS.—The following late cases contain, in the prevailing opinions, the dissenting opinions, the briefs of counsel and the monographic footnotes, a very thorough discussion of the right of unsecured general claims (exclusive of statutory liens and claims for torts) against *quasi* public corporations to payment before the claims of prior contract creditors.

ALLOWED.—In these cases the unsecured claim was allowed precedence: *Southern Ry. Co. v. Carnegie Steel Co.* 176 U. S. 257 (20 Sup. Ct. 347); *Atlantic Trust Co. v. Woodbridge C. & Irrig. Co.* 79 Fed. 37, 86 Fed. 975;

Suit by the United States Investment Corporation, Limited, and Percy H. Blyth, against the Portland Hospital and others to foreclose a mortgage. There was a decree for plaintiffs, from which W. Y. Masters, receiver of the hospital, appeals, claiming precedence for the creditors of the receiver over the mortgage of plaintiff that had been given some years before the receivership began. A motion to dismiss the appeal was overruled, and the decree of the trial court upheld.

MOTION OVERRULED; AFFIRMED.

Decided 15 April, 1901.

ON MOTION TO DISMISS APPEAL.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is a motion to dismiss the appeal because notice thereof was not served upon the Portland Hospital, E. H. Habighorst, trustee, J. Benson Starr, and Charles H. Chance, whose interests, it is contended, are adverse to the appellants. These parties did not appear in the court below, but made default. Prior to the amendment of Section 537, Hill's Ann. Laws (Laws 1899, p. 228), the statute required the notice of appeal to be served on all parties whose interests in relation to the judgment or decree appealed from were in conflict with the reversal or modification sought, notwithstanding such parties may have been in default: (*Moody v. Miller*, 24 Or. 179, 33 Pac. 402; *Jackson County v. Bloomer*, 28 Or. 110, 41 Pac. 930); but the section as amended provides that if the appeal is not taken at the time the judgment is rendered, it may be taken within a specified time thereafter, by serving a notice thereof on such adverse party or parties as have appeared in the action

Farmers' L. & Trust Co. v. American Waterworks Co. 107 Fed. 23; *McIlhenny v. Binz*, 26 Am. St. Rep. 705; *Union Trust Co. v. Richmond City Ry. Co.* 48 L. R. A. 41.

DENIED.—In these cases the unsecured claim was not allowed precedence: *Lackawana I. & Coal Co. v. Farmers' L. & Trust Co.* 176 U. S. 298 (20 Sup. Ct. 363); *International Trust Co. v. T. B. Townsend B. & Contr. Co.* 95 Fed. 850 (37 C. C. A. 396); *Illinois T. & Sav. Bank v. Doud*, 105 Fed. 123 (44 C. C. A. 389, 52 L. R. A. 481); *Contracting & Build. Co. of Ky. v. Continental Trust Co.* 108 Fed. 1; *Rhode Island Locomotive Works v. Continental Trust*

or suit. The manifest purpose of this change in the law was, as its language clearly indicates, to require the notice of appeal to be served only upon the parties who had appeared, and to dispense with the necessity of serving those who were in default. There could have been no other reason for the amendment. The motion to dismiss is therefore overruled.

MOTION OVERRULED.

Decided 13 January, 1902.

ON THE MERITS.

For appellant there was an oral argument with a brief by *Mr. William Y. Masters*, to this effect:

Portland Hospital was not organized under the private corporation law of the state, but was a public corporation: *McDonald v. Mass. Gen. Hospital*, 120 Mass. 432.

That these claims are a lien prior to respondents' mortgage and trust deed see: *Hembree v. Dawson*, 18 Or. 474 (23 Pac. 264); *Hopfensack v. Hopfensack*, 61 How. Pr. 508; *Beckwith v. Corral*, 56 Ala. 12; *Heisen v. Binz*, 147 Ind. 284 (45 N. E. 104); *Cake v. Mohun*, 164 U. S. 311 (17 Sup. Ct. 100); *Jaffray v. Roob*, 72 Iowa 335 (33 N. W. 349); *Fosdick v. Schall*, 99 U. S. 253; *Raht v. Attrill*, 106 N. Y. 423 (60 Am. Rep. 456, 13 N. E. 282); *Burnham v. Bowen*, 111 U. S. 783 (4 Sup. Ct. 675); *Girard Life Ins. Co. v. Cooper*, 162 U. S. 530; *Karn v. Rorer Iron Co.* 86 Va. 758.

We respectfully submit that there are three grounds upon which these receivers' claims should be adjudged a prior lien to plaintiffs' upon the property in the hands of the receiver.

Co. 108 Fed. 5; *Whitely v. Central Trust Co.* 34 L. R. A. 303; *Manchester Locomotive Works v. Truesdale*, 9 L. R. A. 140; *McCornack v. Salem Ry. Co.* 34 Or. 543.

RELATIVE RANK OF MORTGAGES AND DEBTS OF RECEIVER.—Note in 54 Am. St. Rep. at p. 404, under heading, Claims of Receiverships; note in 71 Am. St. Rep. at p. 379, under heading, Receivers' Certificates; and note in 83 Am. St. Rep. at pp. 72 and 75, under heading, Liens for Debts Created During the Receivership.

RELATIVE RANK OF MORTGAGES AND CLAIMS FOR TORTS COMMITTED PRIOR

I. Upon the broad principle that the receiver holds the property for the benefit of all parties interested; as much for the mortgagee as for other creditors, and all receiving the benefit, all should bear the burden. It is contended by respondent that the rule giving priority to debts incurred by receivers applies only to railroads. There is only one case in the supreme court of this state, so far as we have found passing directly upon this question and that is the case of *Hembree v. Dawson*, 18 Or. 474, which holds exactly the converse of respondents' contention. That decision is the rule in this state; credit has been extended to the receivers of the court on its authority, and for this court to declare a different rule at this time will tend to impair the stability of its decisions.

It is said that to allow these receiver's claims to be paid out of the proceeds of the sale of the mortgaged property would impair the obligation of the mortgage contract, but respondents concede, and the authorities they cite also hold, that this can be done in the case of a railroad. What better right, in principle, can a court have to impair the obligation of a mortgage contract on a railroad than any other property? It is claimed by respondents that the right is based on "public convenience;" but on what principle can "public convenience" take a man's property away from him without compensation? It is true that "public convenience" may be a ground for appropriating private property, but it is always done by giving proper and adequate compensation. We think that the only true principle on which a court can act in a case of this kind, is on the ground that the mortgagee is benefited by the receivership in the same manner as unsecured cred-

TO RECEIVERSHIP—PRIORITY ALLOWED.—*Green v. Coast Line R. Co.* 54 Am. St. Rep. 379, and note beginning near bottom of page 426, 33 L. R. A. 806; *Southern Ry. Co. v. Bouknight*, 70 Fed. 823.

PRIORITY REFUSED.—*St. Louis Trust Co. v. Riley*, 30 L. R. A. 456.

RELATIVE RANK OF MORTGAGES AND SUBSEQUENT TAXES.—*Central Trust Co. v. New York C. & Northern R. Co.* 1 L. R. A. 260; note in 54 Am. St. Rep. at p. 421; note in 71 Am. St. Rep. at p. 383.

MONOGRAPHIC NOTES.—Claims Which Take Precedence Over Mortgages of Railways and Like Property, 54 Am. St. Rep. pp. 400-432, and particularly

itors and thereby has received compensation. If it be placed upon the ground of public convenience, where is the line to be drawn? A store, a mill, a hotel, are all public conveniences and a hospital might almost be said to be an absolute necessity. On what principle can one be included and the other excluded in applying the rule? The cases in the United States Supreme Court cited by respondents hold that the rule is to be applied to the railroads, but do not hold that it is not to be applied to other corporations. The latter question, so far as we have been able to find has never been passed upon by that court. We also call the court's attention to the fact that in nearly, of not quite all, of the cases cited by respondents, the claims that were sought to be made prior liens accrued before the receiver was appointed, which presents an entirely different question.

In the case of *McDonald v. Mass. Gen. Hospital*, 120 Mass. 432, the court in speaking of a hospital organized exactly as the Portland Hospital, says: "A corporation, the object of which is to provide a general hospital for sick and insane persons, having no capital stock nor provision for making dividends or profits, deriving its funds mainly from public and private charity, and holding them in trust for the object of sustaining the hospital, conducting its affairs for the purpose of administering to the comfort of the sick, without expectation or right on the part of those immediately interested in the corporation to receive compensation for their own benefits is a public charitable institution." Now, by what principle is it to be decided that the rule is to be applied to a public institution such as a railroad and not to this public institution?

pp. 404 to 425: The Relation of Receivers to Pre-Existing Liens, and the Remedies for Their Enforcement, 71 Am. St. Rep. at pp. 377-379; Liens for Debts Contracted Prior to a Receivership, 83 Am. St. Rep. at p. 73.

Receiverships of Partnerships and Private Corporations.

RELATIVE RANK OF MORTGAGES AND UNSECURED DEBTS.—On the question whether unsecured claims against private corporations accrued before the appointment of a receiver can take precedence over prior mortgage liens is discussed in the following cases and notes:

ALLOWED.—The unsecured creditors of a coal mining company obtained

II. In this particular case, the mortgagees having stood by and acquiesced in the incurring of this indebtedness, being in court and accepting service of petitions and reports from time to time and making no objection to the appointment or continuation of the receivers for some five years, and actually desiring their continuance to avoid taxes until times improved, they are now estopped to claim their mortgage and trust deed are a prior lien to the claims incurred by the receivers.

III. The mortgagees have received payments on their claims from the receivers and a large amount of money has been expended during the receivership in repairs and permanent improvements on the property, which should have gone to pay these claims, all of which the respondents are allowed to take by the decree of the court below, contrary to every rule of equity and right.

For certain creditors of the receiver claiming priority over the mortgage of plaintiff there was an oral argument and a brief by *Mr. A. King Wilson*, to this effect:

A hospital is as much a public corporation as a railroad or a telephone company (*Keeley v. Carolina Mut. T. & Tel. Co.* 90 Fed. 29); or as a mine (*Drennan v. Mercantile T. & Dep. Co.* 115 Ala. 592, 23 So. 164, 39 L. R. A. 623, 67 Am. St. Rep. 72); or as a street car company (*Pickering v. Townsend*, 118 Ala. 351, 23 So. 703); or as an irrigation company (*Atlantic Trust Co. v. Woodbridge C. & Irrig. Co.* 86 Fed. 975. Other cases bearing on the subject are *Diamond Match Co. v. Taylor*, 83 Md. 394 (34 Atl. 1015); *Southern Ry. Co. v. Carnegie Steel Co.* 176 U. S. 257 (20 Sup. Ct. 347); *Metropolitan Trust Co. v. Lake Cities Elec. Ry. Co.* 100 Fed. 897. Nearly all of the

payment of their claims out of the accounts due the company when the receiver was appointed, as against the claim of the mortgagee: *Drennan v. Mercantile T. & Dep. Co.* 39 L. R. A. 623, 67 Am. St. Rep. 72.

DENIED.—The unsecured creditors failed to obtain precedence over the mortgagees in these cases: *Seventh Nat. Bank v. Shenandoah Iron Co.* 35 Fed. 436; *Fidelity Ins. & Safe Deposit Co. v. Shenandoah Iron Co.* 42 Fed. 372; *Laughlin v. United States Rolling Stock Co.* 64 Fed. 25; *Newton v. Eagle & Phoenix Mfg. Co.* 76 Fed. 418; *Farmers' L. & Trust Co. v. Bankers', etc.*

cases cited by respondents are distinguished from the case at bar by the fact that the indebtedness in the cases cited was incurred before the appointment of the receiver; further, in some of the cases cited by our opponents the mortgagee was not a party to the suit which issued the receiver's certificates or ordered the indebtedness incurred.

The Portland Hospital was in no sense of the word a private corporation. It was not organized under the chapter of our code providing for the organization of private corporations, but under the chapter for the organization of charitable societies, etc. It had no capital stock, and no one received any benefit from the running of the institution except the public.

As far as I know, it is true that the Supreme Court of the United States has not applied the doctrine of preference of labor claims made before appointment of receivers to any case except that of a railroad, but, to date, it has never passed on the question. What is the reason of the rule? Certainly not the simple fact that it is a railroad, but because the welfare of the public is served by having it operated. I believe the rule would be the same if it was a toll road, a ferry across a river, or a toll bridge across the Willamette, or a flour mill in the early days of Oregon, or the terminal or union depot of Portland, Oregon, a boat on a river, and many others. Cases are decided on principles, not because a cow is white or black, nor because one is a railroad and another a hospital.

To my mind, the fact that no receiver's certificates were issued, has no bearing on the case, when the indebtedness was incurred by order of the court, with full knowledge of the

Tel. Co. 31 L. R. A. 403, 51 Am. St. Rep. 690; *Merriam v. Victory Min. Co.* 37 Or. 321.

MONOGRAPHIC NOTE.—See 71 Am. St. Rep. at pp. 361-365, for note, Priority of Pre-existing Claims.

RELATIVE RANK OF MORTGAGES AND DEBTS OF RECEIVER.—As to whether the bills incurred by a receiver of a private corporation or a partnership under the orders of the court are entitled to payment not only out of the income but out of the *corpus* of the property before the claims of prior mortgagees, see the following cases:

ALLOWED.—In this instance the court ordered bills for supplies furnished
40 OR.—34.

facts. A part of the money which our clients produced was used to preserve and protect the property, by paying insurance, improving the property, etc. There is no question but these debts would be good against the property if the respondent had foreclosed their mortgage and had a receiver appointed. It makes no difference whether a party in a suit in equity is plaintiff or defendant. The respondents are parties herein and have consented to the proceedings herein.

For respondents there was a brief over the name of *Chamberlain & Thomas*, with an oral argument by *Mr. Geo. E. Chamberlain*.*

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is a suit to foreclose a mortgage executed in February, 1893, by E. H. Habighorst, as trustee for the Portland Hospital, and the Portland Hospital Guarantee Company, to the United States Investment Corporation, and a certain deed, intended as a mortgage, executed in March, 1893, by the same parties, to the Northwest Loan & Trust Company, and by the latter assigned to the plaintiff Blyth in trust for his coplaintiff. The mortgage and deed of trust were given to secure the payment of various notes, aggregating some \$50,000 and interest. After they had been recorded, and on November 27, 1894, a receiver of the property of the Portland Hospital was appointed, *ex parte*, and before service of process, in a suit brought against the hospital and the plaintiffs herein by J.

to its receiver in charge of a hotel to be paid before the mortgage: *Knickerbocker v. McKindley C. & Min. Co.* 64 Am. St. Rep. 55.

DENIED.—On other occasions the mortgages have been held a first lien: *Farmers' L. & Trust Co. v. Grape Creek Coal Co.* 50 Fed. 481 (16 L. R. A. 603, with note, Power to Permit a Receiver of a Private Corporation to Create Liens on its Property); *Hanna v. State Trust Co.* 70 Fed. 2 (30 L. R. A. 201); *Doe v. Northwestern C. & Transp. Co.* 78 Fed. 62; *Baltimore B. & L. Assoc. v. Alderson*, 90 Fed. 142; *Hooper v. Central Trust Co.* 29 L. R. A. 262; *International Trust Co. v. United Coal Co.* 83 Am. St. Rep. 59.

MONOGRAPHIC NOTE.—See 83 Am. St. Rep. pp. 77-80 for note, Creation of Liens by Receivers of Private Corporations.—REPORTER.

*The argument of attorneys for respondents is not given here because it is substantially reproduced in the opinion of the court.—REPORTER.

D. Lee and others as trustees, ostensibly to have the title declared forfeited. The receiver was authorized to manage and conduct the hospital as it had been conducted by the corporation prior to his appointment, and he and his successors in office operated it until about the time this suit was begun, in January, 1899, during which time they contracted debts and incurred liabilities for labor and supplies amounting to about \$10,000, which are unpaid. The receiver, who was made a party to this suit, answered, setting up such debts, and asking that they be decreed to be a lien upon the property prior in right to plaintiffs' mortgage and deed of trust, which the court below denied, and hence this appeal.

1. There are several reasons why the decree of the court below should be affirmed. In the first place, it is not alleged, nor is there any proof, that the court appointing the receivers authorized them to contract debts or incur liabilities to take precedence over prior vested liens, or that it ever made any order that the debts of the receiver should be so preferred, either before or after they were incurred. All that is contended in this regard is that the mere fact that the receivers were authorized to operate and conduct the hospital *ipso facto* gave preference to any debts they might thus contract over prior liens on the property. But this position finds no support in the authorities. The ordinary duties of a receiver are to protect and preserve the property pending the litigation; and all expenses incurred by him in so doing, as well as a reasonable compensation for his services, are payable out of the income of the property, if any, or, if not, out of the property itself: *Beckwith v. Carroll*, 56 Ala. 12. But the duty to preserve the property by no means includes the right to create debts for other purposes. Before a receiver can incur such obligations, he must be authorized by the court; and even then the debts created by him will not be preferred to prior liens unless such preference is given in the order authorizing him to incur the obligation, or in an order approving and ratifying the debts, and decreeing that they should be paramount liens. "The jurisdiction of the court to appoint receivers of prop-

erty," says the supreme court of New York, "has for its primary object the care and custody of the property which is the subject of the receivership pending the determination of the questions involved in the litigation, and to enable the court, by placing the property under the control of its officer, to preserve it to answer to the final decree which may be made in the action. But the receiver cannot of his own motion contract debts chargeable upon the fund in litigation. The court must authorize expenditures on account of the property before they can be charged thereon; and while it may and does, in its discretion, allow expenses incurred by a receiver strictly for preservation to be charged upon the fund, although incurred without the prior sanction of the court, it is, nevertheless, the order of the court, and not the act of the receiver, which creates the charge, and upon which its validity depends": *Vilas v. Page*, 106 N. Y. 439 (13 N. E. 743). See, also, 3 Cook, Corp. (4 ed.) §§ 876, 877; *Wesson v. Chapman*, 77 Hun, 144 (28 N. Y. Supp. 431); *Cake v. Mohun*, 164 U. S. 311 (17 Sup. Ct. 100); *Lewis v. Linden Steel Co.* 183 Pa. 248 (38 Atl. 606). So we conclude that for this reason alone the receiver is not entitled to the relief prayed for in his answer.

2. But there is yet another reason why the decree should be affirmed. The suit in which the receiver was appointed was not one in which the court making the appointment had authority without the consent of prior lien creditors to decree that debts contracted by the receiver in carrying on the business of the defendant corporation should take precedence over prior contract liens. Where a court of chancery takes possession of a railroad or other similar property of public corporations, and operates the same through a receiver, debts contracted for labor, supplies, and other necessary purposes, before as well as after the appointment of the receiver, may be made a first lien upon the income, and, if that is not adequate, upon the *corpus* of the property. But this is an extraordinary power, exercised only in cases of railroad and other like corporations of a *quasi* public character charged with a public duty, and for reasons peculiar to that character of property:

McCornack v. Salem Ry. Co. 34 Or. 543 (56 Pac. 518, 1022); *Merriam v. Victory Min. Co.* 37 Or. 321 (60 Pac. 997); *Green v. Coast Line R. Co.* 97 Ga. 15 (54 Am. St. Rep. 379, and note, 24 S. E. 814, 33 L. R. A. 806). But under none of the authorities is a court authorized to thus displace contract liens upon the property of individuals or private corporations. "Extensive as are the powers of a court of equity," says Judge GRESHAM, "they do not authorize a chancellor to thus impair the force of solemn obligations and destroy vested rights. Instead of displacing mortgages and other liens upon the property of private corporations and natural persons, it is the duty of courts to uphold and enforce them against all subsequent incumbrances. It would be dangerous to extend the power which has recently been exercised over railroad mortgages (sometimes with unwarranted freedom) on account of their peculiar nature to all mortgages": *Farmers' L. & Trust Co. v. Grape Creek Coal Co.* (C. C.) 50 Fed. 481 (16 L. R. A. 603, and note). In an exceptionally strong and vigorous opinion by Judge CALDWELL in *Hanna v. State Trust Co.* 70 Fed. 2 (30 L. R. A. 201, 16 C. C. A. 586), reversing an order and decree authorizing a receiver of an irrigating company appointed on the application of a junior mortgagee to borrow money and issue certificates to be preferred liens on the property, for the purpose of maintaining, protecting, and preserving it, it is said: "The rights of the citizen, lawfully acquired by contract, are under the protection of the Constitution of the United States, and, like the absolute rights of the citizen, are not dependent for their existence or continuance upon the discretion of any court whatever. Constitutional rights and obligations are no more dependent upon the discretion of the chancellor than they are on the discretion of the legislature. * * * If it were once settled that a chancery court, through a receiver appointed on the petition of a junior mortgagee, could carry on the business of such insolvent corporations at the risk and expense of those holding the first or prior liens on the property of the corporation, such liens would have little or no value. It is no part of the duty of a court

of equity to conduct the business of insolvent private corporations, any more than it is to carry on the business of insolvent natural persons. If it may take under its control the property of an insolvent private corporation, and authorize a receiver to carry on its business, and make the debts incurred by the receiver in so doing paramount liens on all the property of the corporation, and enjoin its creditors in the meantime from collecting their debts, it is not perceived why it may not proceed in the same way with the estate of an insolvent natural person." See, also, *Vilas v. Page*, 106 N. Y. 439 (13 N. E. 743); *Seventh Nat. Bank v. Shenandoah Iron Co.* (C. C.) 35 Fed. 436; *Fidelity Ins. & Safe Dep. Co. v. Shenandoah Iron Co.* (C. C.) 42 Fed. 372; *Fidelity Ins. T. & Safe Dep. Co. v. Roanoke Iron Co.* (C. C.) 68 Fed. 623; *Snively v. Loomis Coal Co.* (C. C.) 69 Fed. 204; *Doe v. Northwestern Coal & Transp. Co.* (C. C.) 78 Fed. 62; *Hooper v. Central Trust Co.* 81 Md. 559 (32 Atl. 505, 29 L. R. A. 262).

Hembree v. Dawson, 18 Or. 474 (23 Pac. 264), is in nowise in conflict with this doctrine. That was a suit brought by attaching creditors to set aside an alleged fraudulent mortgage upon a stock of goods, wares, and merchandise. A receiver was appointed pending the litigation, with authority to manage and sell the property. Upon the settlement of his accounts, after he had disposed of all the property, and upon an application for a distribution of the proceeds, the court allowed him his commission and expenses out of the fund, and this order was affirmed on appeal. But there was no attempt in that case to give debts and liabilities incurred by the receiver preference over a lien not foreclosed in the suit.

3. It is alleged in the answer, and insisted upon here, that the debts and liabilities were contracted by the receiver with the knowledge, and without the objection of the plaintiffs. It is doubtful whether this allegation is supported by the testimony. But, even if it is, it does not estop the plaintiffs from denying that such debts shall take precedence over their mortgage lien. The receiver was not appointed at their request, nor upon their application, nor was there anything in

the receivership proceedings to indicate to them that it was the intention to charge the mortgaged property with a preferred lien for debts contracted by the receiver. Where a mortgagee procures the appointment of a receiver with power and authority to operate and conduct the business of the mortgagor, he cannot object to the payment of the expenses incurred for such purposes in preference to his lien: *Heisen v. Binz*, 147 Ind. 284 (45 N. E. 104). But where the appointment is not made upon his application he has a right to insist that the debts contracted by the receiver shall not take precedence over his lien, although he may be a party to the suit in which the receiver was appointed: *Metropolitan Trust Co. v. Tonawanda Val. & C. R. Co.* 103 N. Y. 245 (8 N. E. 488).

4. During the receivership some \$1,800 or \$2,000 was paid to the plaintiffs on their mortgage, and perhaps \$500 or \$600 spent in improving the mortgaged property, and it is contended that the creditors of the receiver are entitled to a lien upon the property for the amount of such payments and expenditures. Whether these were made from the earnings of the hospital or from donations by private persons is difficult to determine. But, however that may be, no lien can be enforced therefor in this suit. If it appears in the progress of certain kind of receiverships that interest has been paid, or permanent and lasting improvements made on the mortgaged property, or other expenditures had beneficial to the mortgage lien creditors out of the earnings that ought to have been applied in payment of debts for labor and supplies, it is within the power of the court having charge of the receivership to use the income, and sometimes the proceeds, of the mortgaged property to discharge obligations which, but for the diversion of the fund, would have been paid in the ordinary course of business: *Smith*, Rec. 575. But we know of no rule by which the demands of mere contract creditors, although for debts incurred by a receiver, can, on account of an inequitable or unjust application by him of the income from the property under his charge, be set up as preferred claims in a suit to foreclose a prior mortgage.

The decree of the court below will be affirmed. AFFIRMED.

Argued 15 January; decided 3 February, 1902.

MOORES v. CLACKAMAS COUNTY.

[67 Pac. 662.]

EQUITY—VOID TAX-SALE CERTIFICATES AS CLOUDS ON TITLE.

1. A suit in equity may be maintained against a county to remove a cloud upon the title to realty created by tax-sale certificates held by the county, based upon a void assessment, as such suit is not in the nature of a suit to avoid payment of taxes, and in form the suit may be either a technical suit to remove a cloud or one to determine an adverse interest in the land under Section 504 of Hill's Ann. Laws.

2. The distinction between a suit to remove a cloud on a title and a suit to quiet a title or determine an adverse interest is that in the former the pleader should show what the cloud is and why it should be removed, while in the latter it is only necessary to state the rights of the plaintiff and that the defendant claims some interest or estate adverse thereto.

NATURE OF SUIT UNDER SECTION 504.

3. The statutory remedy provided by Section 504 of Hill's Ann. Laws is an enlargement of the equitable remedy to remove a cloud, and may be invoked without waiting for possession to be disturbed by legal proceedings; and it also affords efficient relief against instruments and proceedings, such as tax-sale certificates, void on their face, or, if not thus void, where any attempt to enforce them would necessarily reveal their invalidity, whereas without the statute such instruments and proceedings, because of their patent invalidity, would not constitute a cloud.

PLEADING—DISCLAIMER.

4. In a suit to determine adverse claims to realty a denial that defendant claims any right, title, or interest in the premises except as hereinafter stated, followed by an affirmative defense, is not a disclaimer, since the renunciation is only partial, and the affirmative matter is expressly excepted therefrom.

PLEADING—NECESSITY OF STATING FACTS.

5. The rules of code pleading require parties litigant to state the facts upon which they rely and not to set forth opinions or conclusions; as, for example, affirmative matter set out as a defense in a suit against a county to determine adverse claims to realty arising from void tax-sale certificates held by the county, charging plaintiff with seeking to avoid taxes justly chargeable, without alleging in any manner how or why they were so chargeable, or any facts showing any attempted assessment of any kind, is wholly insufficient for any defensive purpose whatever.

PLEADING—DEPARTURE—EQUITABLE RELIEF.

6. Although the manner of instituting a suit to remove a cloud upon the title to real property and a suit to determine adverse claims thereto is different, it being necessary to set out in the complaint in the former the nature of defendant's claim, whereas in the latter it is only necessary to allege that defendant claims an adverse interest, and call upon him to set it forth, the relief sought in both suits is identical; and hence, in an action to determine adverse claims, wherein defendant declined to disclose the nature of its claim, complainant's reply, disclosing that the adverse claim complained of was a

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43	271
43	274
40	536
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technical cloud on the title, did not constitute such a departure as would require the suit to be dismissed, but the court, having jurisdiction of the subject-matter, would decree such relief as plaintiff would have been entitled to, had the suit been a technical suit to remove a cloud.

From Clackamas: THOS. A. McBRIDE, Judge.

Suit by Chas. B. Moores against Clackamas County to have certain tax-sale certificates canceled, and for such other relief as might be proper. Plaintiff had a decree, and defendant appealed. AFFIRMED.

For appellant there was a brief and an oral argument by *Messrs. Harrison Allen*, District Attorney, and *C. D. and D. C. Latourette*.

For respondent there was a brief and an oral argument by *Mr. Woodson T. Slater*.

MR. JUSTICE WOLVERTON delivered the opinion.

This suit, as revealed by the complaint, is brought to determine a conflicting or adverse claim to realty. It is alleged that plaintiff is the owner in fee simple of the real property in controversy, consisting of certain blocks and lots in Minthorn Addition to the City of Portland, and that defendant claims some right, title, estate, or interest therein adverse to the title and interest of the plaintiff; that said claim is unlawful and wrongful and without right, by reason whereof plaintiff is greatly embarrassed in the free use, enjoyment, and disposition of the property; that he is unable to state fully the nature of said adverse and conflicting claim, and prays that defendant be required to set it up, etc. The answer "denies that the defendant claims some right, title, claim, or interest in or to the premises described in the complaint, or any part thereof, except as hereinafter stated. Denies that defendant's claim is unlawful, wrongful, or without right. Defendant, further answering, alleges that the plaintiff has failed and refuses to pay any part of the state, county, and school taxes justly chargeable against the premises described in the com-

plaint for the years 1892, 1893, amounting to \$906, \$1,358.27, and, although no act has hitherto been done by defendant to enforce collection thereof, the plaintiff now seeks by this suit to quiet title solely for the purpose of avoiding such taxes, and contrary to equity and good conscience." Thereupon the plaintiff replied, denying the said affirmative allegations, and setting up affirmatively that he derived his title from the Oregon Land Company; that said company on January 10, 1891, conveyed the premises in controversy, with other premises, to one H. P. McNary, as trustee for plaintiff and others, who owned the same in common; that subsequently, to wit, on June 3, 1895, the whole of said premises were partitioned by decree of the Circuit Court of the State of Oregon for Clackamas County, duly made and rendered, and the realty in the complaint herein described set apart to plaintiff in severalty; that in the year 1892 the assessor of Clackamas County assessed the whole of said premises, then belonging to and standing in the name of H. P. McNary as trustee for plaintiff and other persons, to the Oregon Land Company, and that such subsequent proceedings were had in an effort to collect a tax thereon that the whole of said premises, including the realty of plaintiff, was sold to the defendant by the sheriff to satisfy such pretended tax, who on August 8, 1893, issued a certificate of such sale; and that, since the issuance thereof, defendant has been asserting a claim of right and title under it antagonistic to plaintiff's title. Similar facts are set up touching an attempted assessment for the year 1893, whereby an alleged tax of \$1,358.27 was levied, and the whole of the premises again sold and bid in by the county, and a like certificate issued to it. The defendant declining to offer any evidence at the trial to substantiate the affirmative allegations of its answer, the plaintiff introduced evidence showing that for the years named all unsold lots in said Minthorn Addition were assessed in gross to the Oregon Land Company, followed by proceedings terminating in the issuance of the sheriff's certificates of sale to the defendant. The decree was in accordance with the prayer of the complaint, and the defendant appeals.

1. It is conceded by counsel for defendant that the assessment forming the basis of the certificates of tax sales against which the plaintiff is invoking the remedial arm of equitable jurisdiction is void and wholly insufficient upon which to base a tax sale, the cardinal contention being that no suit can be maintained against a county or avoid the payment of taxes. But this is not a suit of that nature; the purpose of plaintiff is to get rid of these sheriff's certificates of sale, which he claims are void, not on their face, but under the facts alleged and developed by the evidence. In the case of *Title Trust Co. v. Aylsworth*, 40 Or. 20 (66 Pac. 276), where the assessment was not merely irregular, but wholly void, it was held that a subsequent owner was entitled to maintain a suit to remove a cloud created by the certificate of the sheriff based upon void tax proceedings. So, in *Hughes v. Linn County*, 37 Or. 111 (60 Pac. 843), it was held that plaintiff had a remedy against the county to enjoin the enforcement of a void process for taxes assessed against the former owner, being a warrant in the hands of the sheriff, under which he was threatening to levy upon and sell the property against which the alleged assessment was made, upon the ground that the sale and consequent further proceedings would becloud the plaintiff's title. Within these authorities, plaintiff is not without a remedy.

2. This brings us to defendant's next contention,—that plaintiff's remedy, if he had any, was by a suit to remove a cloud, and not to quiet title or determine an adverse interest. We have said, as it respects the manner of instituting the proceeding, that a suit to remove a cloud and one to quiet title are essentially different. By the former, a plaintiff is required to set up the nature and purpose of defendant's claim or pretended muniment, so far as he is able, following it with the statement of such facts and circumstances respecting it as will indicate its invalidity, and thereby show his right to have it removed as a cloud (*Teal v. Collins*, 9 Or. 89); while in the latter it is only necessary for the pleader, after the necessary averments of title and possession, to allege that defendant

claims an adverse interest or estate, and call upon him to set it forth [*Zumwalt v. Madden*, 23 Or. 185 (31 Pac. 400); *O'Hara v. Parker*, 27 Or. 156 (39 Pac. 1004); *Goldsmith v. Gilliland* (C. C.), 22 Fed. 865].

3. The statute is an enlargement of the equitable remedy, so that the party in possession, or, under the recent amendment (Laws, 1899, p. 227), where no other person is in possession, may invoke it without waiting for his possession to be disturbed by legal proceedings, or successive or any judgments in ejectment to be given in his favor, as he was required to do at common law; and it affords efficient relief against a void instrument or proceeding so apparent on its face that no intrinsic evidence is necessary to show its invalidity, or where the instrument or proceeding is not thus void, but the party claiming under it, in order to enforce it, must necessarily offer evidence which will inevitably show its invalidity and destroy its equity: 6 Am. & Eng. Ency. Law (2 ed.), 168; *Ellis v. Northern Pac. R. R. Co.* 77 Wis. 114 (45 N. W. 811). Without the statute, such an instrument or proceeding was held not to constitute a cloud because of its invalidity, either apparent or necessarily required to be disclosed before it could be utilized to the injury of complainant, although it may in fact operate to his annoyance and positive detriment and prejudice: *Sperry v. City of Albina*, 17 Or. 481 (21 Pac. 453); 3 Pomeroy, Eq. Jur. (2 ed.) § 1399. Now, in many instances it is undoubtedly true that the object to be obtained may be accomplished by the adoption of either remedy. In one case the plaintiff sets up the facts showing the cloud and its invalidity, while in the other he calls upon the defendant to set up the character and nature of his claim, that it may be adjudicated upon and its legal effect determined, and thereby have the plaintiff's title quieted. The plaintiff has preferred the latter mode of procedure in the present instance. The defendant by answer denies that it claims any right, title, or interest in the premises, except as subsequently alleged, or that its claim is unlawful, wrongful, or without right, and then alleges that plaintiff has failed to pay certain taxes justly

chargeable against the said premises; and, although no act has hitherto been done by defendant to enforce the collection thereof, plaintiff now seeks to quiet title solely for the purpose of avoiding such taxes.

4. It seems to be insisted that the answer is a disclaimer on the part of the county, but it cannot be so treated. A disclaimer consists in a denial of the insistence upon any claim or right in the thing demanded, and a renunciation of all claim thereto: 1 Beach, Mod. Eq. Prac. § 281. A party may interpose an answer and disclaimer in the same suit, but each must refer to a separate and distinct part of the complaint, and may not be directed to the same matter, as they would be inconsistent, and the disclaimer would then be paramount: 1 Beach, Mod. Eq. Prac. § 281. Defendant denies "except as hereinafter stated," so that there is no absolute disclaimer, such as the rules touching the plea require.

5. By the affirmative matter in the answer, plaintiff is charged with seeking to avoid taxes justly chargeable, not pretending, however, to allege in any manner how or why they are justly chargeable; nor are facts alleged showing any attempted assessment of any kind, presumably relying upon the simple fact that taxes have not been paid upon the realty for the years named, and that it could make no difference whether they had been legally levied or not. It is wholly insufficient for any defensive purpose, and might have been stricken out on motion or disregarded, which left the denials to deal with, and these were probably insufficient to put the plaintiff to the proof that defendant was in fact claiming some title, estate, or interest adverse to the plaintiff's title or estate, except it might be to entitle him to costs; but before proceeding to trial he set up the matter he was entitled to prove if a full answer had been interposed by way of reply, and then established it by proper proof.

6. The facts show that defendant was asserting a right or claim adversely and injurious to the title of the plaintiff, and without legal right or authority, its denials nevertheless to the contrary. The reply may not have been necessary, but

it was not interposed, nor can it be so construed, with a view to obtaining relief different from that sought by the complaint, or to let in different proof, and therefore does not constitute a departure. It merely sets up matters which the defendant was called upon to disclose, but declined to do after making such denials as put the plaintiff to proof of his case. This test may be applied: Suppose the defendant had set up the matter, instead of the plaintiff, and it was admitted to be true; could plaintiff have recovered in this suit, or would he have been remitted to a technical suit to remove a cloud? The remedies are so near of kin that the plaintiff has his choice which to adopt. If he wishes to proceed as for a removal of a cloud, his complaint must disclose such a state of facts as will reveal the existence thereof, under the authorities; but, if he proceeds under the statute to determine an adverse claim, his complaint must show a cause on that theory, and the defendant must disclose his claim or interest, and, if it consists in a technical cloud upon plaintiff's title, we see no reason why he should go out of court and begin anew, when it is shown that he has a clear right to relief, and a court of equity has jurisdiction of the subject-matter. The relief is the same in either event, which is that the plaintiff's title be cleared of the incumbrance or quieted. The decree in this case should simply restrain the defendant from the assertion of any claim, right, or title under and by virtue of the certificates of sale and the tax proceedings upon which they are founded. We do not desire to be understood as enjoining the county from asserting its right, if it has any, to assess a valid tax against these premises and collect it.

These considerations affirm the decree of the court below, and it is so ordered.

AFFIRMED.

Argued 9 January ; decided 27 January, 1902.

FELLER v. GATES.

[56 L. R. A. 630, 67 Pac. 416.]

OFFICIAL BONDS—LIABILITY OF SURETIES THEREON.

The sureties on the bond of a public officer are not liable for his acts done in a private capacity and in violation of his official duty ; for example, the act of a constable in receiving money from an execution debtor under a contract not to serve an execution against the debtor, and to repay the money if the judgment should be reversed on an appeal, being beyond his powers and a violation of his duty, the sureties on his official bond are not liable to the execution debtor for his conversion of the money.

From Marion: GEO. H. BURNETT, Judge.

Action of conversion by Francis Feller against John H. Gates and others commenced in March, 1900, to recover from a constable and the sureties on his official undertaking the sum of \$126.40, alleged to have been received by virtue of his office and converted to his own use. The complaint alleges, in substance, that the defendant John H. Gates was duly elected constable of the district of Woodburn, Marion County, Oregon, for a term of two years, beginning on the first Monday in July, 1898, and that prior thereto he took the prescribed oath of office, and filed an undertaking, with his codefendants, W. Corby and L. W. Guiss, as sureties, conditioned that if he should not faithfully execute the trust imposed upon him as said constable, and pay over according to law all moneys that might come into his hands by virtue of his office, they, or either of them, would pay the State of Oregon the sum of \$1,000, which undertaking having been duly approved, Gates entered upon the discharge of the duties of his office, and was at the commencement of this action constable of said district; that Angie L. Feller, having commenced an action in the justice's court of said district against the plaintiff herein and others, secured a judgment therein November 21, 1899, for the sum of \$116.40, and, an execution having been issued thereon, it was delivered to said constable, who, by virtue of his office, and in pursuance of said writ, threat-

ened to collect said sum from this plaintiff; that, in order to stay said execution and prevent further costs thereon, and to gain time to take and perfect an appeal from said judgment, plaintiff herein paid Gates the sum demanded in said writ, and \$10 claimed by him as costs thereon, which sum was received in lieu of an undertaking on appeal, to be returned if plaintiff herein should, within the time prescribed by law, serve and file a notice of appeal from said judgment, and execute and file a proper undertaking therefor; said agreement being as follows:

“In the Justice’s Court for Woodburn District,
Marion County, Oregon.

Angie L. Feller, Plaintiff,

v.

W. F. Feller, Francis Feller,
and Henry Bock, Defendants.

Received of Francis Feller \$126.40 cash in lieu of an undertaking on appeal in the above-entitled court and cause, and to stay execution in judgment against defendants above-named until said cause is fully determined upon appeal in the Circuit Court of Marion County. It being understood that said money is not to be applied upon or towards the payment of said judgment, and that said money will be returned to Francis Feller upon his filing with the justice of the above-named court a sufficient undertaking, and making service of notice of appeal on plaintiff in said cause within the statutory time.

Dated November 28, 1899.

J. H. GATES,

Constable for Woodburn District,

Witness: F. G. EBY.

Marion County, Oregon.”

It is alleged that, within the time prescribed by law, plaintiff served and filed a proper notice of appeal, and executed and filed a suitable undertaking therefor, fully complying with all the conditions of said deposit, and on January 29, 1900, the circuit court for Marion County, having jurisdiction of the cause and parties, reversed said judgment so rendered by said justice’s court; that on January 10, 1900, plaintiff demanded of Gates said sum of \$126.40, but he, refusing to pay

any part thereof, wrongfully converted the same to his own use, and that on February 2, 1900, upon a proper application therefor, plaintiff secured permission to begin this action, wherefore he demands judgment against said constable and his sureties for the sum of \$126.40. Gates having answered, judgment was given against him for that sum, but Corby and Guiss demurred to the complaint on the grounds (1) that they were improper parties; (2) that the complaint does not show any act done by Gates in discharging his official duty or by virtue of his office, and is insufficient to charge them as sureties; and (3) that the complaint does not state facts sufficient to constitute a cause of action,—which demurrer was sustained, and, plaintiff refusing to plead further, the action was dismissed as to them, and he appeals. AFFIRMED.

For appellant there was a brief over the name of *Carson & Adams*.

For respondents there was a brief over the names of *J. C. Johnson, F. G. Eby, H. J. Bigger, and Grant Corby*.

MR. JUSTICE MOORE, after making the foregoing statement, delivered the opinion of the court.

It is contended by plaintiff's counsel that Gates received said sum of \$126.40 in his official capacity as constable, and, not having repaid it upon plaintiff's demand, the sureties on his official undertaking are liable for his conversion thereof, and hence the court erred in sustaining the demurrer to the complaint and in dismissing the action. "The sureties of a sheriff or constable," says Mr. Brandt in his work on Suretyship and Guaranty (2 ed.), § 566, "are liable for his acts in seizing property which are done *virtute officii*, but whether or not they are liable for his acts done *colore officii* is a matter concerning which there is great conflict of authority." In *People v. Schuyler*, 4 N. Y. 173, Mr. Justice PRATT, in defining these terms, and explaining when the sureties are liable

for, and when exempt from, the consequences of the acts of the chief executive and administrative officer of a county, says: "The authorities recognize a principle or rule by which the acts of the sheriff, for which his sureties may be held liable, can be distinguished from those acts for which they will not be held liable. The former are termed 'acts done *virtute officii*'; and the latter, '*colore officii*.' The distinction is this: Acts done *virtute officii* are where they are within the authority of the officer, but in doing it he exercises that authority improperly, or abuses the confidence which the law reposes in him, whilst acts done *colore officii* are where they are of such a nature that his office gives him no authority to do them." The allegation of the complaint is to the effect that Gates, by virtue of his office as constable, and in pursuance of the command of the execution which had been delivered to him, threatened to collect from plaintiff herein the sum named in the writ. If this averment were not qualified by the receipt, which is made a part of the complaint, it would undoubtedly show a collection in pursuance of the execution, and by virtue of his office as constable, thereby rendering the complaint unassailable on demurrer. The receipt shows that Gates did not intend to apply the money specified therein to the satisfaction of the judgment against the plaintiff, but that its acceptance was to enable the latter to take an appeal,—a proceeding in which a constable has no right to intermeddle, and in which he was powerless to stay the enforcement of the judgment, which could only have been secured by giving an undertaking conditioned that the appellant would satisfy any judgment that might be given against him in the appellate court on appeal, and upon the filing of such undertaking the justice rendering the judgment would have recalled the execution: Laws, 1899, p. 109, §§ 42-44. It was incumbent, therefore, upon Gates to execute the command of the writ delivered to him, and, if necessary, to levy upon and sell the personal property of the judgment debtors, so that he might make the sum demanded, on or before the return day, for the benefit of the judgment creditor, whose agent he was for that

purpose: Freeman, Executions (2 ed.), § 283. Instead of discharging the obligation imposed upon him by law, he agreed to repay to plaintiff herein the money so received, when an appeal from the judgment should be taken and perfected; thus manifestly stipulating to violate his trust. The promise of the constable to repay the money upon the performance of the stipulated condition necessarily shows that it was not received even under color of office; for, to render the payment a collection *colore officii*, the party making it must part with the title to the money, relying upon the right of the officer to receive it in trust for the adverse party. The receipt conclusively shows that the plaintiff herein did not intend to part with the title to the money, or expect the constable would pay any part of it to the judgment creditor, so that Gates received it in his private character, in trust for plaintiff, and not by virtue or even color of his office.

It remains to be seen if the sureties on his official undertaking are liable for the acts of their principal on account of money so received. In *Governor v. Perrine*, 23 Ala. 807, it was held that when a sheriff has taken property under attachment, which he afterwards sells by agreement between the plaintiff and defendant in attachment, without an order of court, his sureties are not liable on their bond for his failure to pay over the money. Mr. Justice GIBBONS, speaking for the court in deciding the case, says: "The sale of the goods having taken place without any order of court, or authority to the sheriff to make the sale, but being made by the consent of the parties in the attachment suit, it could not be said to be an official act of the sheriff, but rather that of a private individual as the agent of the parties to the suit. The securities of the sheriff are only liable for his defaults while acting in his official capacity; and that has been defined to be, action in obedience to legal process in his hands." In *Schloss v. White*, 16 Cal. 65, the plaintiff and defendant, a sheriff, entered into an agreement in respect to the sale of attached property so similar to the contract evidenced by the receipt in the case at bar that we quote copiously therefrom: "It seems that plain-

tiff sued out attachment against one Kalkmann, and had it levied on some goods. Other creditors issued similar process, also levied on the same goods. Afterwards the plaintiff dismissed his proceeding, and claimed that the goods levied on, or a part of them, were his own property; they having been procured by Kalkmann by false pretenses. The plaintiff sued the sheriff in replevin. He did not take the goods out of the sheriff's possession, but came to an arrangement with the sheriff whereby the sheriff agreed to sell the goods, and keep the proceeds to answer the judgment, if the plaintiff obtained one in his replevin suit. The sheriff sold the goods and paid the money into court, saying nothing about this arrangement; and the money was paid, under the order of the court, on the claim of the other creditors. The sureties of the sheriff had nothing to do with, and gave no sanction to, this arrangement. The question is, are they bound to the plaintiff for the goods or the money received from the sale, the plaintiff having obtained judgment in the replevin suit? We think they are not. It was no part of the sheriff's duty to make this agreement with the plaintiff to sell the goods, and to hold the proceeds for the plaintiff in a certain event. He had no legal authority, as sheriff, to sell these goods, and to hold the money on bailment for the plaintiff. If the plaintiff trusted him with the custody of the goods, and gave him authority to sell them, he became, so far, the agent of the plaintiff, and the plaintiff must look to him merely as his agent. He cannot hold the sureties bound for executory contracts of this sort, entered into without their consent. If so, there would be scarcely a limit to their responsibility; for contracts of this sort might run for years, and represent every variety of complication. If the sheriff had retained the goods, he might have obtained a bond of indemnity from the other creditors; or, if the plaintiff had given bond, he might have relieved the sheriff from the custody of the goods. But here the sheriff assumes, by this agency, a responsibility for himself and his sureties greater in degree and different in kind from that imposed by law, and it would be unjust and impolitic to en-

courage such dealings by holding sureties responsible for them. It would be against law so to hold; for the sureties are entitled to stand upon the precise terms of their contract, by which they stipulated in this case for the official, not the personal, dealings of their principal."

In the case at bar the contract entered into between the plaintiff and the constable was private in character, and presumably for their mutual benefit; and as the sureties may properly invoke the rule of *strictissimi juris* (Murfree, Sher. § 82), thereby rendering them liable only for official acts (*Hill v. Kemble*, 9 Cal. 71; *State v. Mann*, 21 Wis. *684), it follows that the judgment is affirmed. AFFIRMED.

Argued 8 January; decided 20 January, 1902.

LAZELLE v. MILLER.

[67 Pac. 307.]

TRIAL—CONSIDERING PLEADINGS AS AMENDED.

1. Where a party, when certain testimony is objected to, asks leave to amend a pleading to conform to the facts as stated by his witnesses, and the court reserves its ruling but admits the testimony, and decides the point as if the amendment had been allowed, the appellate court will assume that the amendment was in fact allowed and made.

TRIAL—VARIANCE.

2. There is not a material variance between an allegation that two makers of a note were severally liable for certain parts thereof, and that each was surety for the other, and proof that the makers were originally liable for the entire sum, but afterward the payee agreed that they should be severally liable for certain parts of the debt, and that each should be liable as surety for the other for the balance, since the real question in both forms of the statement is as to the suretyship.

PARTNERSHIP NOTE—DISSOLUTION—EFFECT OF ASSUMING DEBTS.

3. Where a creditor of a partnership, holding a note jointly executed by the partners, has notice that one partner has assumed the firm debts, thus creating the relation of principal and surety between the partners, an extension of the time of payment to the partner assuming the debt, without the consent of the other partner thereto, operates to discharge the latter from all liability.

NOTE—EFFECT OF ACCEPTING INTEREST IN ADVANCE.

4. The acceptance of interest on a note in advance by a creditor from his principal debtor is an extension of the time of payment, and will release the surety, if made without his consent.

From Clackamas: THOS. A. McBRIDE, Judge.

Action on a note by Mary A. Lazelle and Ella C. Duncan against G. R. H. Miller and J. G. Pilsbury, in which plaintiffs had judgment and Miller appeals. **REVERSED.**

For appellant there was a brief and an oral argument by *Messrs. C. D. and D. C. Latourette*.

For respondents there was a brief over the name of *Hedges & Griffith*, with an oral argument by *Mr. J. E. Hedges*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is an action upon a promissory note for \$300, of date April 2, 1889, executed by G. R. H. Miller and J. G. Pilsbury, and payable to J. K. Bingham one year after date. The complaint is in the usual form, alleging the execution of the note, certain payments thereon, the death of the payee, the admission of his will to probate, the title of plaintiffs to the note, and that there is due and unpaid thereon \$267.50, with interest from October 2, 1895. Miller alone answered, and, after some admissions and denials, alleges affirmatively that at the time of the execution of the note he borrowed of the payee \$74 and his co-maker \$226, and that they signed the note severally for the amount each received and as surety each for the other, which relationship was known to the payee at the time; that thereafter, on February 2, 1891, he (Miller) fully paid the amount he originally borrowed, with accrued interest, and the same was accepted in full satisfaction by the payee, who thereafter, and without his knowledge or consent, received from the other maker two payments of interest in advance, by reason whereof Miller was discharged from liability. The reply put in issue the new matter alleged in the answer. Upon the trial the plaintiffs gave in evidence the note described in the complaint, with the indorsements thereon, and rested. The two makers of the note were thereupon called by the defendant, and testified, in effect, that at the time of its execution they were partners as carpenters and builders, and jointly borrowed the money, for the purpose, as the payee

knew at the time, of paying and discharging the partnership debts, that thereafter, and in February, 1891, upon a dissolution of their partnership and settlement of accounts between them, it was ascertained that of the note in suit Miller owed and should pay \$87.50 and Pilsbury the balance; that they called upon the payee of the note, and advised him of the settlement and agreement, and he thereupon received from Miller and credited upon the note the \$87.50, with the understanding that Miller should be released from any further liability thereon; that thereafter the payee, without Miller's knowledge, on August 26, 1891, received and accepted from Pilsbury \$24, interest to October 2, 1891, and on September 15, 1894, \$26.75, interest to October 2, 1894. Objection was made to the introduction of testimony showing the relationship between the makers of the note, their settlement, and the payment by Miller, on the ground that it was a variance from the allegations of the answer. At the time the objection was made Miller asked leave to amend his answer to conform to the proof, but the court reserved its decision until the testimony was all in, when, upon motion of the plaintiffs, it directed a verdict in their favor, without, so far as the record discloses, passing on the motion for leave to amend.

1. It is contended in support of the judgment that the defendant cannot show by parol that he and Pilsbury each borrowed a certain part of the amount mentioned in their joint note, because such a showing contradicts and varies a written contract; that there was a fatal variance between the oral testimony offered and admitted and the allegations of the answer; and that the testimony does not support, or tend to support, the defense pleaded. These objections, we think, can and should be disposed of on the ground that, although there was no formal order allowing defendant to amend his answer to conform to the proofs, the testimony was admitted, and the case decided by the trial court, as if it had been so amended.

2. The motion by the plaintiffs for an order directing the jury to return a verdict in their favor seems to have been

allowed on the assumption that the facts, if properly pleaded, would constitute no defense to the action, because they do not show that the relationship of principal and surety between the makers of the note existed at the time of its execution. And, moreover, there was in fact no substantial variance between the averments of the answer and the testimony. The gist of the defense alleged is that Miller was surety for his codefendant, Pilsbury, and that the payee of the note, with knowledge of that fact, entered into a binding agreement with Pilsbury to extend the time of payment; and whether the relation of principal and surety existed between the parties at the time the note was executed or by virtue of some subsequent contract was immaterial: *Union Life Ins. Co. v. Hanford*, 143 U. S. 187 (12 Sup. Ct. 437). The case, therefore, should, we think, for the purpose of this appeal, stand as if the answer had alleged—what the proof shows—that, after the execution and delivery of the note, the partnership between the makers was dissolved, and one of them assumed and agreed to pay the balance due thereon.

3. This brings us to the question as to whether the acceptance of interest in advance by the payee from Pilsbury, with knowledge of the settlement between him and the defendant Miller, operated as a discharge of Miller. It is familiar law that if, on the dissolution of a partnership, one partner assumes and agrees to pay the debts of the firm, as between himself and the retiring partner he becomes the principal and the other the surety as to such debts; and a creditor of the firm, with knowledge of their agreement, is bound to so treat them in his subsequent dealings: *Colgrove v. Tallman*, 2 Lans. 97; *Colgrove v. Tallman*, 67 N. Y. 95 (23 Am. Rep. 90); *Smith v. Sheldon*, 35 Mich. 42 (24 Am. Rep. 529); *Johnson v. Young*, 20 W. Va. 614, 657; *Frow's Estate*, 73 Pa. 459; *Millerd v. Thorn*, 56 N. Y. 402, 406; *Walter A. Wood Mach. Co. v. Oliver*, 103 Mich. 326 (61 N. W. 507). It follows, therefore, that, since Pilsbury, on the dissolution of the partnership, assumed and agreed to pay the note upon which this action is based, Miller was a mere surety for him as to the bal-

ance due thereon, and any subsequent agreement of the payee with Pilsbury, without Miller's consent, to extend the time of payment, would discharge the latter, under the familiar rule that where a creditor, by a positive contract with the payee, extends the time of payment of the debt without the consent of the surety, he thereby discharges the surety. In such a case it is a matter of no consequence that the creditor did not know of the relation of principal and surety at the time of the original contract, or even if such relation had been created since that time. It is enough if he knew of it before he made the agreement with the principal to extend the time of payment: *Union Life Ins. Co. v. Hanford*, 143 U. S. 187 (12 Sup. Ct. 437).

4. The only remaining question is whether the payment of interest in advance constitutes an agreement to extend the time of payment, within the meaning of this rule. Upon this subject the authorities are not entirely harmonious, but, as said by Mr. Brandt, "the decided weight of authority, and, it seems, the better reason, is that the payment in advance of interest on the debt by the principal to the creditor is of itself, without more, sufficient *prima facie* evidence of an agreement to extend the time of payment for the period for which the interest is paid, and works the discharge of the surety": 2 Brandt, Sur. (2 ed.) § 352. See, also, *Binnian v. Jennings*, 14 Wash. 677 (45 Pac. 302); *Bank of Brit. Colum. v. Jeffs*, 15 Wash. 230 (46 Pac. 247); *Woodburn v. Carter*, 50 Ind. 376; *Peoples' Bank v. Pearsons*, 30 Vt. 711. The only proof of the payment of interest in advance is the indorsement on the note, which, it was suggested at the argument, is insufficient to support the allegation, because the amount mentioned as having been paid is, according to plaintiff's estimate, insufficient to cover the interest for the period designated. But, whether or not the amount actually paid was sufficient to cover the interest for the period indicated, the indorsement acknowledges the receipt on a certain date of a specified sum of money as interest to a given future date, and is at least *prima facie* proof that it was so received by the payee. It

follows from these views that the receipt and acceptance of interest in advance by the payee from Pillsbury, without the consent of the defendant Miller, operated to discharge him from liability on the note. The judgment will therefore be reversed, and the cause remanded for such further proceedings as may be proper, not inconsistent with this opinion.

REVERSED.

Argued 16 January ; decided 3 February, 1902.

RANDALL v. SIMMONS.

♦ [67 Pac. 513.]

SHAM PLEADING.

1. To justify a court in striking out matter from a pleading as sham, under Section 75 of Hill's Ann. Laws, it must be evidently false or pleaded in bad faith: *Miser v. O'Shea*, 37 Or. 231, cited.

FRIVOLOUS PLEADING.

2. A frivolous pleading is one that self-evidently does not raise a cause of action or defense: *The Victorian*, 24 Or. 121, cited.

PLEADING—JOINDER OF INCONSISTENT DENIALS AND DEFENSES.

3. The holder of a note brought action on it alleging that it was unpaid, except that interest to a certain date had been paid (which amounted to \$5). Part of the defendants denied "that no other payment has been made thereon than \$5, and deny that there is any sum due from these defendants thereon," and alleged affirmatively that defendants were sureties, and had been relieved from liability by an unauthorized extension of time to the principal, who was the other defendant. *Held*, that the affirmative defense was not so inconsistent with the denial as to authorize the court to strike out the former, the denial that no payment in excess of \$5 had been made being, in effect, an allegation of payment, which defendants could join with the affirmative defense, under Hill's Ann. Laws, § 73, authorizing defendant to join separate defenses.

PLEADING—INCONSISTENT DEFENSES.

4. The complaint in an action on a note alleged that it was jointly and severally executed for value by its makers, which was not directly denied by defendants, but they alleged the affirmative defense that plaintiff, knowing that defendants were sureties, relieved them from liability by an unauthorized extension of time to the principal. *Held*, that the tacit admission of the receipt for value for the execution of the note was not so inconsistent with the affirmative defense of suretyship as to authorize the court to strike out the latter.

INCONSISTENT DEFENSE—EFFECT OF EXTENDING NOTE.

5. A denial in the answer in an action on a note that there is any sum due on the note from defendants is not so inconsistent with an affirmative defense that the defendants are merely sureties, and have been relieved from liability by an unauthorized extension of time by the principal, as to authorize the

court to strike out the affirmative defense, as such denial is compatible with the affirmative defense, because the alleged extension of time would discharge the defendants from all liability.

From Clackamas: THOMAS A. McBRIDE, Judge.

Action on a note by W. G. Randall against Allen Simmons and others. From a judgment in favor of the plaintiffs, the defendants C. H. Sarver and George A. Hamilton appeal.

REVERSED.

For appellants there was a brief over the name of *C. D. & D. C. Latourette*, with an oral argument by *Mr. C. D. Latourette*.

For respondent there was a brief over the name of *Hedges & Griffith*, with an oral argument by *Mr. Joseph E. Hedges*.

MR. JUSTICE MOORE delivered the opinion.

This is an action to recover the sum of \$100 on a promissory note, alleged to have been jointly and severally executed for value by the defendants April 28, 1893, to the plaintiff, payable six months thereafter, with interest at the rate of ten per cent per annum, upon which the interest had been paid to October 28, 1893. The defendants C. H. Sarver and George A. Hamilton filed an amended answer as follows: "Admit the execution and delivery of the note mentioned in the complaint, but deny that no other payment has been made thereon than \$5, and deny that there is any sum due from these defendants thereon. For a further answer and separate defense defendants allege that said note was given for a loan of money to Allen Simmons, who alone received the valuable consideration; that these defendants were merely sureties for said Allen Simmons, which fact was well known to plaintiff at the time of the delivery of said note; and that, notwithstanding said suretyship and such knowledge, the plaintiff, through his general agent, W. C. Johnson, for a valuable consideration, to wit, the sum of \$2, by said Allen Simmons

paid to said plaintiff at the time of the maturity of said note, without the knowledge or consent of these defendants the sureties, or either of them, extended the time of payment of said note from its maturity, October 28, 1893, six months, or until April 28, 1894, thereby releasing these defendants from all liability thereon." Plaintiff's motion to strike out the further and separate defense on the grounds (1) that the same was sham, (2) that it was frivolous, and (3) that it was inconsistent with the other parts of the answer, having been sustained, and the defendants refusing to plead further, judgment was rendered against them for the sum of \$99.90, with interest from October 28, and they appeal.

1. The statute provides that sham, frivolous, and irrelevant answers and defenses may be stricken out on motion: Hill's Ann. Laws, § 75. The allegations of new matter in the further and separate answer are not false in fact, or pleaded in bad faith, and hence such averments are not sham: *Foren v. Dcaley*, 4 Or. 92; *Miser v. O'Shea*, 37 Or. 231 (82 Am. St. Rep. 751, 62 Pac. 491).

2. A frivolous answer is one in which the issues raised do not exhibit any cause of defense, the insufficiency in this respect being apparent from an inspection of the averments: *The Victorian*, 24 Or. 121 (32 Pac. 1040, 41 Am. St. Rep. 838). The averments of new matter stricken out by the court are evidently material, disclosing an apparent defense, to overcome which argument, at least, would be required to show that the allegations were trifling; and when it is necessary to resort to that method to discover such defect, the answer is not frivolous: 20 Ency. Pl. & Pr. 18; *Cottrill v. Cramer*, 40 Wis. 555.

3. It remains to be seen whether the allegations of new matter in the answer are so inconsistent with the prior admissions and denials therein as to render them subject to be stricken out on motion. The editors of the Encyclopedia of Pleading and Practice (vol. I, p. 856), in speaking of inconsistent defenses say: "Two prominent elements intended in the code system of pleading are that falsehoods should not be put upon the record, and that the pleadings should disclose the facts relied

on in support of or defense against the action.” Tested by these important constituents, the allegations of new matter in the answer, if admitted to be true, do not necessarily establish the falsity of the admissions and denials put upon the record in the other part of the answer, nor do the averments of new matter fail to reveal the facts relied upon in defense to the action. The complaint alleges that the defendants, for value, jointly and severally executed the note sued upon; and this averment, not having been denied in the answer, is thereby admitted: Hill’s Ann. Laws, § 94. It is also alleged in the complaint that the interest on the note for six months had been paid, and that there was then due thereon the sum of \$100 and interest at ten per cent. per annum since October 28, 1893. It will be remembered that the answer denies that no other payment had been made on the note than \$5, or that there is any sum due from these defendants thereon. The rate of interest specified in the note being ten per cent. per annum, the averment in the complaint that the interest thereon had been paid to October 28, 1893, or for six months from April 28, 1893, when the note was executed, is tantamount to an allegation that the sum of \$5 only had been paid. The denial, however, that no other payment had been made on the note than \$5 is a negative pregnant, equivalent to alleging the payment of any greater sum (*Scoville v. Barney*, 4 Or. 288), and this denial was probably so construed by the court, for it gave judgment for the sum of \$99.90 and interest from October 28, 1893, instead of \$100, as demanded, thus apparently conceding that the sum of \$5.10 had been paid on account of interest. But, if no payment had been made on the note, the defendants, being authorized to set forth as many defenses as they had (Hill’s Ann. Laws, § 73), could interpose the defense of payment, and hence their defective denial in relation thereto is not inconsistent with their allegations of new matter in the answer. The denial that there is any sum due from these defendants is the contradiction of a mere conclusion of law stated in the complaint; but such negation, instead of being inconsistent, is compatible with the allegations of new matter in the answer to the effect that no sum

is due on the note from the sureties, because the alleged extension of the time of payment granted by the plaintiff to their principal, without their consent, discharged them, as they contend, from all liability thereon.

4. The inconsistency, therefore, if it exist, must be found between the admission in the answer that the note was executed for value and the averment therein that Simmons alone received the consideration, and that Sarver and Hamilton were his sureties, which fact was well known to the plaintiff at the time of the delivery of said note. If the answer had denied that the note was executed for value, except as thereafter alleged, and then set out in the separate answer the facts relied upon by the sureties to defeat a recovery, the pleading would probably have been freed from difficulty. A copy of the note sued on not having been set out, it is impossible to determine from an inspection of the complaint whether the relation of principal and sureties, as alleged in the answer to have existed between the defendants herein and Simmons, was expressed in the instrument or otherwise disclosed to the plaintiff by the makers at the time the note was executed. The answer having alleged, however, that at the time the note was delivered plaintiff knew that Simmons alone received the consideration, and that Sarver and Hamilton were sureties thereon, the source of plaintiff's knowledge becomes unimportant, and the averment is equivalent to a statement that the note was not executed for value received by the appellants: 2 Edwards, Bills & N. § 779. While the plaintiff may have known that the appellants were sureties, as alleged in the separate answer, such knowledge did not change their liability [*Southern Cal. Bank v. Wyatt*, 87 Cal. 616 (25 Pac. 918)], and they, as makers, were jointly liable on the note (*Humphreys v. Crane*, 5 Cal. 173; *Aud v. Magruder*, 10 Cal. 282; *Bond v. Storrs*, 13 Conn. *412; *Bank of Orleans v. Barry*, 1 Denio, 116; *Inkster v. Bank*, 30 Mich. 143; *Rice v. Cook*, 71 Me. 559). The sureties, being thus jointly liable, without any express contract to that effect, could not deny the allegation that they jointly executed the note; and it may be that the instrument was given in the first person

singular, as, "I promise" (2 Edwards, Bills & N. § 967), or, if in the first person plural, it was stipulated that the makers were severally liable, as, "We or either of us promise" (*Pogue v. Clark*, 25 Ill. 333), thus evidencing a several liability and preventing the sureties from denying the allegation in the complaint that they severally executed the instrument.

5. The only inconsistency to be found in the answer is the failure to deny the allegation of the complaint to the effect that the note was executed for value by the appellants, and it remains to be seen whether such defect was so palpable as to warrant the court in striking out the separate defense. The execution of the note having been admitted, the appellants occupied a dual relation. To the plaintiff they are principals, for, having signed the note as makers, they are each equally liable thereon to the payee [*California Nat. Bank v. Ginty*, 108 Cal. 148 (41 Pac. 38)], and such liability does not depend upon the question whether they received any part of the money for which the note was given [*Sprigg v. Bank*, 35 U S. (10 Pet.) 257], it being sufficient if their principal received the consideration [*Pulliam v. Withers*, 8 Dana, 98 (33 Am. Dec. 479)]. To the principal they are sureties only, if the averments of new matter in the answer be admitted as true, and, if compelled to pay the note, they would be subrogated to the rights of the payee; and, as they received no consideration for the liability they assumed by affixing their signature to the note, they could recover from the principal the sum of money that they would be obliged to pay, or, if the principal is insolvent, and one of the sureties was compelled to pay the debt, he could secure contribution from his cosurety. It is probable that the defendants, by failing to deny that the note was executed for value, adopted the theory that they were principals, in the primary sense, and as such liable to the plaintiff, but sought to avoid such liability by alleging in the separate answer the facts relied upon to defeat a recovery. If this be true, they could not well make such denial, because the money was received by one of the principals. In any event, however, as no apparent falsehood is put upon the record, we do not

think the inconsistency adverted to is so manifest as to warrant the court in striking out the allegations of new matter in the answer.

It follows from this conclusion that the judgment is reversed, and the cause remanded for such further proceedings as may be necessary, not inconsistent with this opinion.

REVERSED.

Argued 23 January ; decided 10 February, 1902.

PATTERSON v. PATTERSON.

[67 Pac. 664.]

CONSTRUCTION OF PLEADINGS OBJECTED TO AT THE TRIAL.

1. Under Hill's Ann. Laws, § 84, providing that in the construction of a pleading its allegations shall be liberally construed, with a view to substantial justice, if the sufficiency of a pleading has not been challenged by motion or demurrer, but is drawn in question upon the admission of evidence, the allegations of the complaint and reply should be liberally construed *in pari materia* for the purpose of determining the true intent of the pleader: *Creecy v. Joy*, 40 Or. 28, applied.

IDEM.

2. A reply to a defense of payment of a note by the plaintiff that she purchased it, and paid the balance due thereon, and took an assignment of it, being liberally construed, in the absence of preliminary objections, means that the note was bought and assigned to her, not that she paid it.

PLEADING—PRESUMPTION AFTER VERDICT.

3. Where no motion or demurrer has been interposed to a pleading, every reasonable inference should be invoked in its support, and every legitimate intendment indulged in its aid, after verdict.

From Marion: GEO. H. BURNETT, Judge.

Action by Harriet Patterson against John Patterson and M. L. Chamberlin. From a judgment in favor of defendants entered on the pleadings after a verdict for plaintiff, plaintiff appeals.

REVERSED.

Messrs. Bonham & Martin for appellant.

Mr. William H. Holmes for respondents.

40	560
42	62
40	560
47	98
47	181
40	560
48	248

MR. JUSTICE MOORE delivered the opinion.

This is an action to recover on a promissory note executed by the defendants, John Patterson and M. L. Chamberlin, to the Capital National Bank of Salem, Oregon, June 30, 1892, for the sum of \$239.20, payable on demand, with interest at the rate of ten per cent per annum, and alleged to have been assigned by said bank to plaintiff, who claims to be the owner and holder thereof, and that no part of the same has been paid, except certain specified sums. The answer denies the material allegations of the complaint, and, for a separate defense, avers that the remainder due on said note was paid to the bank March 4, 1893. For a further defense, it is alleged that Chamberlin signed said note as surety only; that the defendant Patterson induced the plaintiff, who is his wife, to take up and pay off the note in question; that she well knew said note was given for her husband's debt; and that Chamberlin was only an accommodation maker. The answer contains other defenses, a statement of which is not necessary to the decision. The reply denies the allegations of new matter in the answer, and contains the following concession: "But plaintiff admits and avers that she did on said fourth day of March, 1893, purchase said note, and pay the balance due thereon to the said Capital National Bank, with her own funds, and took an assignment of the same." At the trial of the issues thus joined the jury found for plaintiff in the sum of \$257.15, whereupon defendants' counsel moved the court for judgment on the pleadings, on the ground that plaintiff had admitted therein that said note had been fully paid by her to said bank, which motion having been sustained, the action was dismissed, and plaintiff appeals.

The question to be considered is whether the admission in the reply that plaintiff purchased the note and paid the remainder due thereon overcomes the allegation of the assignment of the instrument as stated in the complaint and reply, thereby defeating the right of action. It is argued by plaintiff's counsel that, the allegations of the reply not having been

assailed by motion or challenged by demurrer, the verdict aided any defective statement in their pleadings, and, this being so, the court erred in setting aside the verdict and dismissing the action. Defendants' counsel insist, however, that the pleadings should be construed most strongly against the pleader, and, the plaintiff having admitted in the reply that she paid the note, the averment shows that the instrument was thereby discharged, and hence no error was committed as alleged.

1. The statute provides that in the construction of a pleading, for the purpose of determining its effect, its allegations shall be liberally construed, with a view of substantial justice between the parties: Hill's Ann Laws, § 84. In *Stewart v. Balderston*, 10 Kan. 131, under a similar statute (Comp. Laws, Kan. 1879, p. 617, § 115), Mr. Justice VALENTINE, speaking for the court, in construing the allegations of a pleading, says: "But when the proper motions have been made to require the adverse party to so amend his defective pleading as to make it definite, certain, correct, and formal, thereby giving the adverse party notice wherein his pleading is defective, informal, or insufficient, and where the adverse party then refuses to amend his defective pleading, resists the motions to have it amended, and has the motions overruled by the court, the most rigid rule of the common law should prevail. No statement of fact in the pleading which the motions reached should then be taken as true, unless well pleaded; and, if any such statement would bear different constructions, the party demurring should be allowed to adopt any one of such constructions which he should choose. The old rule of the common law that 'everything should be taken the more strongly against the party pleading,' although it can seldom have application under our code practice, should then prevail. After a party has received full notice that his pleading is defective in some particular, and has been asked to correct it, it is his fault if it still remains defective in such particular, and he is the one who should suffer on account of such defective pleading, and not the other party." It has been held

in this state that when the sufficiency of a pleading is challenged by motion or demurrer, and the action of the court in passing upon the objection thus interposed is not waived by answering over, the allegations of the complaint, answer, or reply thus assailed are to be construed most strictly against the pleader: *Pursel v. Deal*, 16 Or. 295 (18 Pac. 461); *Kohn v. Hinshaw*, 17 Or. 308 (20 Pac. 629). A different conclusion, however, seems to have been reached in *Jackson v. Jackson*, 17 Or. 110 (19 Pac. 847). Whatever the rule may be in respect to the interpretation of a pleading when assailed by motion or demurrer, and the action of the court in deciding the issue of law thus involved has not been waived by the defeated party, it is settled in this state, by repeated adjudications upon the subject, that if the sufficiency of a pleading has not been challenged in the manner indicated, but is drawn in question upon the admission of evidence, a liberal construction of the allegations of fact will be adopted: *Specht v. Allen*, 12 Or. 117 (6 Pac. 494); *Baker City v. Murphy*, 30 Or. 405 (42 Pac. 133, 35 L. R. A. 88); *Chan Sing v. Portland*, 37 Or. 68 (60 Pac. 718); *Roseburg Ry. Co. v. Nosler*, 37 Or. 299 (60 Pac. 904); *Cederson v. Oregon Nav. Co.* 38 Or. 343 (62 Pac. 637, 63 Pac. 763); *Oregon & C. R. Co. v. Jackson County*, 38 Or. 589 (64 Pac. 307, 65 Pac. 369); *Mellott v. Downing*, 39 Or. 218 (64 Pac. 393); *Creecy v. Joy*, 40 Or. 283 (66 Pac. 295. No objection having been taken to the reply, its allegations will be liberally construed, for the purpose of determining its effect, with a view of substantial justice between the parties; and the allegations of the complaint and of the reply, not being repugnant, will be construed *in pari materia*, for the purpose of ascertaining the intent of the pleader: *Lavery v. Arnold*, 36 Or. 84 (57 Pac. 906, 58 Pac. 524); *Cederson v. Oregon Nav. Co.* 38 Or. 343 (62 Pac. 637, 63 Pac. 763); *Mayes v. Stephens*, 38 Or. 512 (63 Pac. 760, 64 Pac. 319).

2. Observing these rules of interpretation, we think it reasonably inferable from plaintiff's pleadings that she intended to state that, in consideration of the payment of the remainder

due on the note, it was assigned to her by the bank, and that she was the owner and holder thereof.

3. If it be assumed, however, that the averment of payment of the note by the plaintiff, as alleged in the reply, is a defective statement of the facts constituting the cause of action, the rule is well settled in this state that, where no objection by motion or demurrer is made to the sufficiency of a pleading, every reasonable inference will be invoked and every legitimate intendment indulged in its aid when supported by a verdict. Thus, in *Miller v. Hirschberg*, 27 Or. 522 (40 Pac. 506), Mr. Chief Justice BEAN, speaking upon this subject, says: "No objection was made to the sufficiency of the reply by demurrer or otherwise, and we think it comes too late when made for the first time by motion for judgment notwithstanding the findings of the referee. It avers that the settlement alleged in the answer did not include the claim upon which this action is founded, or any part thereof, or have any reference thereto; and while it may have been defective in not setting forth fully the fraud, error, or mistake relied upon to surcharge or falsify the settlement, we are not trying the question on demurrer, but considering the sufficiency of the pleading after verdict. In such case it is entitled to the benefit of every reasonable inference and intendment in support of the judgment, and will not be held insufficient for a mere defective statement." In *Houghton v. Beck*, 9 Or. 325, it was held that a defect in a pleading, whether of substance or form, which would have been fatal on demurrer, is cured by verdict, if the issue joined be such as necessarily required on the trial proof of the facts defectively stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or that the jury would have given, the verdict. The rule is settled in this state that, while a verdict will never supply the omission of a material averment, it will aid informal defects in the pleading that do not go to the gist of the action: *Nicolai v. Krimbel*, 29 Or. 76, and notes (43 Pac. 865); *Booth v. Moody*, 30 Or. 222 (46 Pac. 884); *Kimball v. Redfield*, 33 Or. 292 (54 Pac. 216); *Hargett*

v. *Beardsley*, 33 Or. 301 (54 Pac. 203); *Foste v. Standard Ins. Co.* 34 Or. 125 (54 Pac. 811); *Hannan v. Greenfield*, 36 Or. 97 (58 Pac. 888); *Savage v. Savage*, 36 Or. 268 (59 Pac. 461); *Chang Sing v. Portland*, 37 Or. 68 (60 Pac. 718); *Roseburg Ry. Co. v. Nosler*, 37 Or. 299 (60 Pac. 904). If it be assumed that there was a defect in the statement of facts in the reply, no objection thereto having been taken, the verdict necessarily cured it, and hence the act of the court in setting aside the verdict and dismissing the action must be held erroneous.

It follows from these considerations that the judgment is reversed, and the cause remanded for such further proceedings as may be necessary, not inconsistent with this opinion.

REVERSED.

Decided 3 February; rehearing denied 22 April, 1902.

OREGON v. CARLSON.

[67 Pac. 576.]

ALIENAGE—FORFEITURE OF TITLE—EFFECT OF NATURALIZATION.

1. Alienage is a disability of an applicant for public lands, generally speaking, but naturalization removes the disability as of the date when the acquisition of title was initiated, and the title cannot thereafter be questioned or set aside on that ground, even by the sovereign.

SUIT BY STATE TO CANCEL DEED—SUBSEQUENT NATURALIZATION.

2. The naturalization of an alien after a suit has been commenced against him by the sovereign to cancel a deed to certain public land that he had obtained by false affidavits does not perfect his title, such a suit being based on fraud rather than on alienage.

TITLE OF PURCHASERS OF PUBLIC LAND—CURATIVE ACT OF 1899.

3. The act of 1899 validating the title to certain tide lands (Laws, 1899, p. 57, § 1), providing that title to all tide lands originally sold, where the purchaser has in good faith paid the purchase price, should be confirmed, without reference to the amount or character of other lands theretofore purchased from the state by such purchaser, was intended to confirm the title of those persons only who had previously purchased from the state the maximum amount in other classes of land, and did not confirm the title of one who had previously obtained tide land from the state by fraud.

CONSTRUCTION OF PUBLIC LAND ACT OF 1899.

4. The title of one who had obtained tide land from the state by fraud was not validated by the public land act of 1899 (Laws, 1899, p. 156, § 9), authorizing the sale of tide lands to citizens of the United States, or to those who have declared their intention to become such, as the statute does not relate to or confirm titles previously granted.

CONSTITUTIONALITY OF PUBLIC LAND ACT OF 1891.

5. The act of 1891, relating to the sale of tide and swamp lands (Laws, 1891, p. 189, § 2), which provides that applicants to purchase tide lands must be citizens of the United States, is not in conflict with Const. Or. Art. I, § 31, providing that white foreign residents of the state shall enjoy the same rights to the possession, enjoyment, and descent of property as native-born citizens, as there is no constitutional right to purchase state lands, and the state may determine the qualifications of purchasers thereof.

From Clatsop: THOMAS A. McBRIDE, Judge.

Suit by the State of Oregon against J. P. Carlson to annul and vacate letters patent to certain state tide lands. From a judgment in favor of the plaintiff, the defendant appeals.

AFFIRMED.

For appellant there was a brief over the name of *J. H. & A. M. Smith*, with an oral argument by *Mr. John H. Smith*.

For the state there was a brief over the names of *Harrison Allen*, District Attorney, and *Fulton Brothers*, with an oral argument by *Mr. Allen* and *Mr. Geo. Clyde Fulton*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is an action, under section 358 of the statute (Hill's Ann. Laws), to annul and vacate a deed or letters patent issued by the state to defendant for certain tide lands, on the ground that it was procured by means of a false affidavit. Under the statute in force at the time, only citizens of the United States and of this state were entitled to purchase tide lands, and an intending purchaser was required to file with his application his affidavit that he possessed the requisite qualifications: Laws, 1891, p. 189; *Spencer v. Carlson*, 36 Or. 364 (59 Pac. 708). In September, 1895, the defendant, a resident alien, who had declared his intention to become a citizen, desiring to purchase the lands in controversy, made and filed with the application therefor his affidavit, stating, among other things, that he was a citizen of the state and of the United States; and, relying thereon, the state land board issued and delivered to him the deed in question. By his

answer in the action he admits the falsity of the affidavit upon which the purchase was made, but says that it was made by mistake and not for a fraudulent purpose, and that, after the issuance and delivery to him of the deed, and before the commencement of this action, he became a naturalized citizen. Plaintiff had judgment in the court below, and defendant appeals, insisting (1) that his naturalization after the execution and delivery of the deed, and prior to the commencement of this action, took effect by relation, and is a complete bar to this suit; (2) that his title was confirmed by the act of February 17, 1899 (Laws, 1899, p. 57), confirming titles to tide lands and tide flats theretofore sold by the state; (3) that the law authorizing the sale of tide lands was so amended prior to the commencement of this suit as to make an alien who had declared his intention to become a citizen a qualified purchaser, and therefore the materiality of the representations made by the defendant at the time of his purchase was waived; and (4) that the provision of the act under which he purchased, confining the right to purchase to citizens of the United States, was in conflict with the Constitution of Oregon, Art. I, § 31, and therefore void.

1. At common law an alien could not hold title to land as against the king, because an interest in the soil required a permanent allegiance that would be inconsistent with the duty he owed to his own sovereign: 1 Bac. Abr. 201. He could, however, by purchase, acquire a freehold interest therein, of which he could only be deprived by a proceeding for that purpose instituted by the sovereign. But if he became a naturalized citizen before an information was filed for the forfeiture of his land, his title became perfect, and could not be divested by proceedings afterwards instituted: *Harley v. State*, 40 Ala. 689; *Osterman v. Baldwin*, 73 U. S. (6 Wall.) 116. The same principle has been applied by the land department and the federal courts to entries made under the homestead, preemption, and mining laws of the United States: *Billings v. Aspen Min. & Smelt. Co.* 51 Fed. 338 (2 C. C. A. 252); *Billings v. Aspen Min. & Smelt. Co.* 52 Fed. 250 (3 C. C. A. 69);

Bogan v. Edinburgh Am. L. Mtg. Co. 63 Fed. 192 (11 C. C. A. 128); *In re Krogstad*, 4 Land Dec. Dep. Int. 564; *Lyman v. Elling*, 10 Land Dec. Dep. Int. 474; *Rougeot v. Weir*, 13 Land Dec. Dep. Int. 242; *Phillips v. Sero*, 14 Land Dec. Dep. Int. 568. Under this doctrine, alienage of the grantee was not a cause for avoiding or setting aside the deed, nor could his title be questioned in a collateral proceeding. It was a mere ground of forfeiture to the state, and, if the alien became a naturalized citizen before proceedings for that purpose were instituted, the reason for the forfeiture ceased to exist; hence no proceedings could be maintained to divest him of his title. The grant to the alien was valid and passed a perfect title, liable only to be forfeited at the suit of the state because of alienage existing at the time the suit to declare the forfeiture was commenced.

2. The case in hand, however, is not an action to declare a forfeiture, but is a direct proceeding under a statute to cancel and set aside a deed obtained by fraud and in violation of law. The right to recover is not based upon the fact that defendant was an alien, but because he did not belong to the class authorized to purchase state lands, and that he obtained the title by a false affidavit. The fact that his alienage differentiated him from the class is a mere incident,—of no more consequence in determining the question than if his disqualification had been caused by some of the other statutory requisites. The sole inquiry is whether at the time of the purchase and the execution and delivery of the deed he belonged to the class authorized to purchase, and whether the state land board was induced to make the conveyance to him by a misrepresentation of existing facts. If, as is admitted, he was not a qualified purchaser at the time, he clearly obtained the title to state lands upon a false affidavit and in violation of law; and, in our opinion, no subsequent act of his can cure the defect therein. His affidavit accomplished the purpose intended, and was the means by which the state was induced to part with its title, and a fraud was thereby committed, whether he was wilfully guilty or not: *Wilson v. State*, 47 Ark. 199,

(1 S. W. 71). It may seem inconsistent for the state to prosecute this action, when defendant at its commencement was a qualified purchaser of tide lands. We have nothing to do, however, with the reason which prompted the action, but must assume that it was brought and is being prosecuted in good faith, and for the purpose of preserving and enforcing the rights of the state and its citizens. We are of the opinion, therefore, that the subsequent naturalization of the defendant did not validate his title, or cure the false suggestion upon which the deed was obtained.

3. It is next contended that defendant's title was confirmed by the act of February 17, 1899 (Laws, 1899, p. 57), which provides "that the titles to all tide lands within this state, and all tide flats not adjacent to the shore in the waters of the state, which have been heretofore sold to purchasers by the State of Oregon—where the purchaser has, in good faith, actually paid to the state the purchase price, and the same has been received by the state, and the purchaser has not purchased from the state to exceed 320 acres of that character or class of land—are hereby confirmed to such and all such purchasers and grantees of the state, without reference to the amount of any other character of lands purchased by such purchaser theretofore from the state." This act was passed immediately after the decision in *Warren v. De Force*, 34 Or. 168 (55 Pac. 532), holding that, under the act of 1878 (Laws, 1878, p. 41), three hundred and twenty acres was the maximum acreage of state land that could be sold to any one person. The proper construction of the statute had theretofore been a subject of controversy, and purchases of tide land had been made upon the theory that the number of acres of similar land previously purchased alone determined the right of the applicant. It was thought that the decision referred to unsettled the titles of parties so purchasing, and the act in question was evidently passed for the purpose of confirming them. If it had been the intention of the legislature to confirm the title to all purchasers of tide lands, whatever the defect, it would have so provided in plain and simple terms, and not have been

particular to confine the act to purchasers who have "not purchased from the state to exceed three hundred and twenty acres of that character or class of lands," and to confirm the title of such purchasers, "without reference to the amount of any other character of lands."

4. It is next urged that the act of 1899 (Laws, 1899, p. 156), authorizing the sale of tide lands to citizens of the United States, or to those who have declared their intention to become such, rendered immaterial the false representations defendant made at the time he obtained title to the land in controversy. But this later act does not refer to, or in any way confirm, titles previously granted. It simply announces the future policy of the state as to the qualifications of purchasers of state lands, and cannot be construed to confirm titles previously conveyed to persons who under the then existing law were disqualified from purchasing, or to render immaterial false representations made by them.

5. And finally it is insisted that the provision of the act under which defendant's purchase was made, limiting the right to purchase to citizens of the United States, is in conflict with the Constitution of Oregon, Art. I, § 31, providing that "white foreigners who are or may hereafter become residents of this state shall enjoy the same rights in respect to the possession, enjoyment, and descent of property as native-born citizens." This question was suggested in *Spencer v. Carlson*, 36 Or. 364 (59 Pac. 708), and, though not directly discussed there, the effect of the opinion is to uphold the constitutionality of the law. We do not understand that by the section of the constitution quoted the state is denied the right to sell and dispose of its lands to such persons as it may deem proper. The right to acquire state lands is not a constitutional one, nor does the constitution guaranty it to any person. The state is the absolute owner of the land, and, as proprietor, has the right to determine for itself the qualifications of purchasers thereof. The case of *State v. Preble*, 18 Nev. 251 (2 Pac. 754), relied upon by the defendant, was brought under a statute (2 Comp. Laws, Nev. § 3818) authorizing the sale of state lands

to any person upon certain terms and conditions; the sole controversy being whether a subject of the Chinese Empire, who was a *bona fide* resident of the State of Nevada, and had complied with its laws in reference to the sale and disposition of its lands, could be denied by the administrative officers the right to purchase state lands. No question was raised or decided as to whether the state could confer the right to purchase upon a particular class of persons, or upon those possessing some special qualification or status. The case is not, therefore, an authority in point, and suggests no reason why we should depart from the conclusions reached in *Spencer v. Carlson*, 36 Or. 364 (59 Pac. 708). The judgment appealed from is therefore affirmed.

AFFIRMED.

Argued 6 February; decided 3 March, 1902; rehearing denied.

SKINNER'S WILL.

[62 Pac. 523, 67 Pac. 951.]

TIME OF APPEALING—EXCEPTING TO SURETIES.

1. Section 541 of Hill's Ann. Laws*, requiring the transcript on appeal to be filed within thirty days from the expiration of the time allowed to object to the sureties on the undertaking, is complied with by filing the transcript within the required time from the justification of the sureties after being excepted by some of the respondents. An objection by one respondent serves to extend the time of the appellant as to all the respondents.

IDENTIFICATION OF EVIDENCE—CERTIFICATE REQUIRED.

2. Where an appeal from the county court to the circuit court is tried in the latter court on testimony given in the former, the evidence is sufficiently identified on appeal to the supreme court by the certificate of the county judge, and does not need the additional certificate of the circuit judge.

SUBSTITUTION OF PERSONAL REPRESENTATIVE—NOTICE.

3. Unless specially required by a statute or a rule of court notice need not be given of a motion to substitute a personal representative for a deceased party to a pending cause. See sections 38 and 524 of Hill's Ann. Laws.

RIGHT TO ABANDON APPEAL AND PERFECT A NEW ONE.

4. Where exceptions are taken to the sureties on an appeal bond, the appellant is not required to produce the sureties for justification, but may abandon the appeal and take a new one: *Van Auken v. Dammeter*, 27 Or. 150, followed.

*NOTE.—The citation here given is to the statute as amended by Laws, 1899, pp. 227, 229.—REPORTER.

40	571
43	548
48	557
40	571
45	91

APPEAL—FILING BOND AFTER EXPIRATION OF TIME.

5. Under Hill's Ann. Laws, § 537, subd. 4, authorizing the court to permit an appellant to perform any omitted act necessary to perfect an appeal where the notice has been given in good faith, the circuit court may allow a new undertaking where the sureties have not been able to justify on the original, and the time for filing the bond has expired.

RULES—AMENDING ABSTRACT BY ASSIGNING ERRORS.

6. Where an appellant, through mistake or inadvertence, has failed to print an assignment of errors in his abstract, as required by Rule 9 of the court (35 Or. 587, 598), he may supply the omission if a proper showing is made: *Fletschner v. Bank of McMinnville*, 36 Or. 553, applied.

APPEAL—PRACTICE AS TO FILING NEW UNDERTAKING.

7. Where confusion and irregularity concerning the undertaking on appeal have been caused by the death of appellant and objections to the sureties on the appeal bond, the preferable practice is for the substituted appellant to tender a new undertaking, and it will be accepted in place of the first one.

WILL—TESTAMENTARY CAPACITY.

8. A testator, when executing his will, was impaired in health and confined to his room, but able to dress himself and go to his meals. On the death of the chief beneficiary under a former will, he discussed with his neighbors and his lawyer the advisability of making another, and sent for the latter to draw a new will. The testator had made memoranda of several gifts, and discussed with the lawyer in detail the proposed gifts, giving intelligent reasons for the provisions he desired. The lawyer was of the opinion that he possessed testamentary capacity. He intelligently transacted other business at the time of making the will. His neighbors, intimate acquaintances, testified that the testator was peculiar, but transacted his own business and exhibited a singular shrewdness which was characteristic of him. Contestant's witnesses believed him incompetent to dispose of his property, but related particular transactions which gave indications of his good sense. On two or three occasions the testator had aimlessly wandered about in a dazed condition, but these were of short duration and apparently caused by temporary physical ailments. A codicil to the will was executed under similar circumstances, except that he had grown physically weaker. *Held*, on a contest of the will and codicil, that the evidence did not show testamentary incapacity: *Chrisman v. Chrisman*, 16 Or. 127, cited.

INSANE DELUSION EXPLAINED.

9. Where a testator, believing and acting upon neighborhood gossip, thought that his daughter-in-law would take measures to possess herself of his property, he was not possessed of an insane delusion which would invalidate his will, since the idea had its basis in an external fact, viz., the statements made by others, although they were untrue: *Potter v. Jones*, 20 Or. 239, 249, cited.

NECESSITY OF PUBLISHING THE PAPER AS A WILL.

10. Under Hill's Ann. Laws, § 3069, prescribing that a will or codicil shall be in writing, signed by the testator and attested by two competent witnesses subscribing their names in the presence of the testator, a will executed in proper form is valid without any publication or any statement by the testator that it is his will or codicil; it being only necessary to observe the formalities required by the statute: *Luper v. Werts*, 19 Or. 122, cited.

EVIDENCE OF EXECUTION OF WILL.*

11. The evidence of the execution of a will and codicil showed the signature of the testator and the subscribing witnesses. One of the witnesses testified that they attested the will and codicil in the presence of the testator. the other witness did not remember that the testator had signed the will, or that he saw the witness attest it, or that he requested the witness to sign. The latter witness, at the first probate of the will, signed the usual affidavit required for making proof to common form, deposing that she saw the testator subscribe the will and codicil and that she signed as a witness at his request and in his presence. The will and codicil contained the usual attestation clause. *Held*, that there was sufficient proof of the execution; if the fact of execution is not clearly proven, it is so nearly so that the balance of necessary evidence is supplied by the presumption that the legal formalities were complied with.

WILL—MANNER OF REQUESTING WITNESS TO SIGN.

12. Where an attorney drawing a will called a person to witness its execution, who signed as a witness, the assumption is warranted that this was done at testator's instance; the attesting clause reciting that the witness signed at the request of the testator, and there being no direct denial that such was the case: *Ames' Will*, 40 Or. 495, cited.

From Polk: REUBEN P. BOISE, Judge.

This is a proceeding originating in the county court to revoke the probate of the will of R. L. Skinner, deceased, resulting in a decree as prayed for. On appeal to the circuit court the probate was sustained, and now the objector appeals to this court. A motion to dismiss the appeal was overruled, Mr. Chief Justice BEAN delivering the opinion, and the case heard in its order. The opinion on the merits was delivered by Mr. Justice WOLVERTON.

MOTION OVERRULED; AFFIRMED.

*NOTE.—As to What Actions Will Amount to a Witnessing of a Will in the Presence of a Testator, see 8 L. R. A., p. 826; *Town of Pawtucket v. Ballou*, 2 Am. St. Rep. 868; *Witt v. Gardiner*, 49 Am. St. Rep. 150, note; *Mendell v. Dunbar*, 61 Am. St. Rep. 283, note; *Ex parte Leonard*, 22 L. R. A. 302; *Burney v. Allen*, 74 Am. St. Rep. 643, note; *Hopkins v. Wheeler*, 79 Am. St. Rep. 819; *Re Cunningham's Will*, 81 Am. St. Rep. 256, 51 L. R. A. 642.

Effect of Having the Will Signed for the Testator by Another Person: *Diehl v. Rodgers*, 47 Am. St. Rep. 908, 915; Note in 22 L. R. A. at p. 299; *Ex parte Leonard*, 22 L. R. A. 302; *Walton v. Kendrick*, 25 L. R. A. 701. See, also, *Re Crawford*, 32 L. R. A. 77.

As to the Effect of Having the Witnesses Sign Before the Testator Has Signed: *Marshall v. Mason*, 79 Am. St. Rep. 305; *Lacey v. Dobbs*, 55 L. R. A. 580; *Brooks v. Woodson*, 14 L. R. A. 160, and note; *Kaufman v. Caughman*, 61 Am. St. Rep. 808; *Gibson v. Nelson*, 72 Am. St. Rep. 254.—REPORTER.

Decided 29 October, 1900.

ON MOTION TO DISMISS APPEAL.

Messrs. George G. Bingham and A.O. Condit, for the motion.

Mr. Webster Holmes, contra.

MR. CHIEF JUSTICE BEAN delivered the opinion.

1. Where there are several respondents, and some of them except to the sufficiency of the sureties on the undertaking for an appeal, the appeal is not to be deemed abandoned as to the other respondents, although the transcript is not filed within thirty days from the expiration of the time allowed them to except to the sureties. It will be a sufficient compliance with the statute if it is filed within thirty days from the justification of the sureties on the exceptions filed by their correspondents.

2. Where a cause originates in the county court, and, on appeal to the circuit court is tried on the testimony given in the county court, it is not necessary, on appeal to this court, that the evidence be identified by the certificate of the circuit judge. It is enough if it is identified by the certificate of the county judge.

3. It is no valid objection to an order granting an application of an executor or administrator to be substituted in place of a deceased party that it was made on the day notice thereof was served upon the attorneys for the opposite party, as notice in such case is believed to be unnecessary, unless required by the court: Hill's Ann. Laws, §§ 38, 524.

4. Where sureties on an appeal bond are excepted to, the appellant is not bound to produce them for justification, but may abandon the attempted appeal, and take a new one: *Holladay v. Elliott*, 7 Or. 483; *Van Auken v. Dammeier*, 27 Or. 150 (40 Pac. 89).

5. Where the sureties on an undertaking for an appeal, when excepted to, attempt to justify, but fail, the circuit court may, under section 537 of the statute, allow a new undertaking to be filed.

6. Where an appellant omits to assign errors in his abstract, through mistake or inadvertence, he will be permitted to amend upon a proper showing: *Fleischner v. Bank of McMinnville*, 36 Or. 553 (60 Pac. 603).

7. Where, after exceptions to the sufficiency of sureties on an undertaking for an appeal, the appellant dies pending their justification, and subsequently, and after the substitution of his executor or administrator, the sureties are produced and justify, after notice to the respondent, this court, on a motion to dismiss the appeal, will not assume to determine the regularity of the proceedings, but will allow the appellant to file a new undertaking here, when he indicates a willingness to do so. The motion to dismiss the appeal is denied, and appellant is allowed ten days in which to prepare and file assignments of error and a new undertaking.

MOTION OVERRULED.

Decided 22 April, 1902.

ON THE MERITS.

For appellant there was a brief over the names of *Webster* and *Frank Holmes*, with an oral argument by *Mr. William H. Holmes*.

For respondents there was a brief over the names of *Sherman, Condit & Park* and *Geo. G. Bingham*, with an oral argument by *Mr. Bingham* and *Mr. A. O. Condit*.

MR. JUSTICE WOLVERTON delivered the opinion.

What purports to be the last will and testament of R. L. Skinner, deceased, and his codicil thereto, were admitted to probate in common form, March 10, 1899, by the county court of Polk County, Oregon. Subsequently, Hiram Alonzo Skinner, a son of the deceased, petitioned the county court to revoke the probate of both instruments and to set them aside. It may be here stated that Hiram Alonzo Skinner has since died, and his widow, Rebecca A. Skinner, has been appointed

his executrix and substituted in this proceeding. The grounds now urged upon which the relief is based are want of testamentary capacity and insufficient attestation. Some questions of practice arising upon the pleadings and the manner in which the appeal was taken from the county court were presented; but, in view of the conclusion we have come to upon the merits, it is not essential that we take further note of them, deeming it more satisfactory that the merits be reached, and made the basis of a final disposition, than that the case should be made to turn upon some question merely preliminary and not decisive of the ultimate controversy. Of course, if it is absolutely essential that preliminary questions be disposed of before the merits can be considered in logical order, it would be our duty to treat of them; but otherwise they are not matters necessary to a determination of the controversy.

We will first examine as to the testamentary capacity of the decedent at the time the will was made. The contention has a two-fold aspect, in that it is insisted (1) that the decedent's mind had become so weakened and impaired by old age, physical infirmities, and other misfortunes that he was incapacitated from making a testamentary disposition of his effects; and (2) it is maintained that his mind was affected by an insane delusion, whereby he was influenced and superinduced to bestow his property upon others than his son, and hence that the will was not the conscious act of the testator. The contention is the same as to the codicil.

8. At the time of the execution of the will the testator was making his home with Caleb Hughes, in West Salem. His health being impaired, he was confined almost exclusively to his room, but able, however, to dress himself and go to his meals. He had previously spoken to Mr. Bingham, his attorney, and discussed somewhat in detail the matter of a redistribution of his property by will. We say redistribution, because he had some years prior made his will, as we may infer from the testimony, disposing of the bulk of his estate to the son of the petitioner, Hiram Alonzo Skinner, who died several

years previous to the execution of the present will. Upon the death of the beneficiary of his first will, the testator at once began to discuss with his neighbors and his attorney the advisability of making another. On the immediate occasion he sent for Mr. Bingham to draw the writing, who, responding to his request, found the testator in his room dressed; and, in anticipation of its final preparation, he had written out with his own hand upon slips of note paper memoranda of the several bequests and devises he desired to make. These were put in proper form by Mr. Bingham; and while so engaged the old gentleman discussed with him the details, and gave intelligent and satisfactory reasons for the particular disposition he was making of his effects as he went along. He knew the objects of his bounty and the relationship he bore to them; comprehended the property he had at his disposal, and directed the manner of its disposition and distribution in detail; and, in the opinion of the witness, was possessed of testamentary capacity. This was manifest, not only from the definite formulation of the different bequests, but from his general demeanor, the aptness and acuteness of his mental faculties, and from the circumstance of his transacting some business with another person touching the sale of wood to him while the will was being drawn. Many other witnesses were called, being neighbors and persons of intimate acquaintance; and the general consensus of their testimony is that while the old man was peculiar in some respects, yet that up to very shortly prior to his death he transacted his own business, and continued to exhibit that peculiar shrewdness which was characteristic of him throughout his life. A number of the contestant's witnesses signified quite clearly that in their opinion he was not competent to transact business or to dispose of his property by will; but, in almost every instance where their attention was called to particular transactions, their narratives indicate the rational demeanor of the testator. It was also shown that on two or three occasions he wandered about aimlessly, apparently in a dazed condition of mind; but these were of short

duration, and probably caused by some temporary physical ailment, which passed away as he recovered therefrom. The codicil was executed under like circumstances and conditions, and, while the decedent had grown perceptibly weaker, his mental vigor was retained, so that he was able to direct and clearly discuss the several changes he was desirous of making in his will, for all of which he gave intelligent reasons, as he passed from one to the other when the writing was being prepared. Without further discussion in detail of the evidence, it being quite voluminous, suffice it to say that from a careful reading and consideration in all of its details we are satisfied that the testator was fully capacitated to dispose of his property by will, and to execute the codicil which followed, within the decisions of this court: *Hubbard v. Hubbard*, 7 Or. 42; *Clark's Heirs v. Ellis*, 9 Or. 128; *Chrisman v. Chrisman*, 16 Or. 127 (18 Pac. 6, 6 Am. Prob. Rep. 156).

9. The alleged delusion which, it is insisted, induced the particular and peculiar disposition complained of, is that his son's wife had designs upon his property, and proposed possessing herself of it, and that, if he should devise the same to his son Hiram Alonzo, she would in some manner acquire it, and that it would be thus diverted from his family. If this was a delusion, he had been possessed of it for a long time, because his former will gave the bulk of his property to trustees for the benefit of his grandson, thus depriving the son and his wife of ultimate ownership; and his present will is cast upon the same idea. He has also, so far as disclosed by the testimony, been consistent in his desire to so dispose of his property that in the main it would not finally come into the hands of his son's wife. The son was remembered in the will by a life estate in a portion of the realty, and was to receive the rents and profits, after the payments of certain expenses, arising out of the remainder, and the daughter-in-law was remembered by a share in the final distribution, so it is apparent that the testator was not biased by any feelings of animosity toward them. He believed, no doubt, that his son could not long survive him, even thinking that he (the testator) might survive him; and

in this he was justified, as subsequent events have demonstrated, for the wife is now prosecuting this proceeding, she being substituted for her deceased husband. Some of the witnesses indicate that the decedent was imbued with the idea that the daughter-in-law would resort to extreme measures in order to possess herself of the property, if it should be divided or bequeathed to his son. If this be so, it was not shown that it was a delusion. It may, for aught that appears, have had its foundation in fact. We do not mean to say that the daughter-in-law was possessed of any such purpose, because there is not a scintilla of evidence in the record to bear out the statement. On the contrary, the proven admissions of the decedent shows her treatment of him to have always been kind, indulgent and considerate. But what we mean is that his information may have been such as to superinduce the belief, and thus the state of his mind may have been the result thereof, and not of sheer delusion. Some of the witnesses relate that, when he was asked to give reasons for thinking that his daughter-in-law intended to possess herself of the property, he answered that the neighbors told him so. Further than this the matter was not pursued. Now, if he believed his neighbors, and acted upon neighborhood gossip, he was not possessed of a delusion; but the idea with which he was imbued had its basis in fact, and hence the will could not have been superinduced by an insane delusion: *Potter v. Jones*, 20 Or. 239 (25 Pac. 769, 12 L. R. A. 161). It is not altogether unnatural or unreasonable that he should desire to keep the property, or the bulk of it, in his family, rather than to have it pass beyond the line of consanguinity; and, while the will and codicil contain some seemingly peculiar provisions, they may be said to be peculiar to the testator, as known by his neighbors in his normal condition. It was suggested that the testator's mind was affected with other delusions; but if they existed at all, which is doubtful, they were such as in no way affected the disposition of his property.

10. The validity of both the will and codicil is also challenged upon the ground that they were not executed in the

manner and with the formalities required by law. The objections urged with the greater emphasis are that the witness Hughes did not see the testator sign, nor hear him acknowledge his signature to the writing, nor did he publish and declare the same and the codicil thereto to be his last will and testament in her presence; and it is further contended that the testator did not request Mrs. Hughes in either instance to attest the writing as a witness. For convenience and perspicuity we will dispose of the matter of publication first, and then discuss the other questions somewhat in the same connection. The statute has prescribed the formalities with which a will shall be executed. It shall be in writing, signed by the testator, or some person under his direction, in his presence, and shall be attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator: Hill's Ann. Laws, § 3069. A codicil is required to be executed in the same manner and with like formalities. In the earlier history of the law, due publication was an essential prerequisite to a valid execution. This consisted in making known in the presence of the witnesses that the instrument being executed was the last will and testament of the testator. In some of the states the formality is preserved by statute, while in many others, as in our own, no allusion is made to it. Under this condition of the law, by the very great weight of authority, it is only necessary to observe the formalities so far as pointed out by the legislature, and publication in any manner is not a prerequisite to the validity of a will. The instrument may be well executed without a word being uttered or intimation made by the testator, or any person for him, to the attesting witnesses or in their presence, that the writing being signed or executed is a will; neither need they know anything of its nature or import: *Luper v. Werts*, 19 Or. 122, 135 (7 Am. Prob. Rep. 243, 23 Pac. 850). And, in further substantiation of the rule, see Schouler, Wills (2 ed.), § 326; Page, Wills, § 227; *Canada's Appeal*, 47 Conn. 450; *Allen v. Griffin*, 69 Wis. 529 (35 N. W. 21).

11. There is signed at the foot of both the will and codicil

the name "R. L. Skinner," attended by a private seal. Both have appended an attestation clause, reciting, in effect, that the paper was signed, published, and declared by the testator to be his act in the presence of the witnesses, who, in his presence and at his request, and in the presence of each other, subscribed their names as witnesses. Subscribed thereto are the names "Mary Hughes" and "George G. Bingham" in the order named. Mr. Bingham testifies that he wrote the will at the request of Mr. Skinner on the day it bears date, December 12, 1898; that the name subscribed thereto is the signature of R. L. Skinner, written by the testator himself; that the name "R. L. Skinner," appearing subscribed to the other writing (the codicil), is his signature, also written by himself; that of the signatures "Mary Hughes" and "George G. Bingham," to both the will and codicil, "Mary Hughes" was written by her in the presence of the witness testifying and in the presence of Mr. Skinner; that the testator was occupying the front room of Mr. Hughes' house; that there was a little stand in the room, which the witness cleared off and used for writing the will; that Mrs. Hughes was called into the room, witness thinks, by himself; that Mr. Skinner told him that he wanted a witness to his will, and the paper was laid on the stand; that Mr. Skinner signed it, witness thinks, while Mrs. Hughes was standing by, witness being present at the time; then Mrs. Hughes sat down and signed it, and sat by the table while witness signed it; that the codicil was written in the same room, at the same stand, and signed in the same manner; and that before Mrs. Hughes signed, in either instance, the attestation clause was read over to her. A little later the witness repeats that the will was signed by Mr. Skinner, and then by Mrs. Hughes and himself, they standing within a foot of the testator; that, after the codicil was written, witness read it over to him, then Mrs. Hughes came in from the kitchen, and it was signed by Mr. Skinner, then by Mrs. Hughes, and then by the witness.

Mrs. Hughes testified, in effect, that she was in the kitchen (a room adjoining the one occupied by the testator) when the will

was being prepared by Mr. Bingham; that Bingham read part of the will over to the testator, but she did not hear distinctly enough to know what it was; that Bingham called her into the room, and that Mr. Skinner was sitting in a chair near the stand; that she did not see him sign his name, and could not swear whether he did or not; that she signed, and then Bingham signed; that testator was still sitting in his chair; that Bingham told her that the paper was Skinner's will, and she was to witness it; that, when the codicil was signed, the testator was sitting up in bed and signed it right at the foot of the bed; that witness was standing in the room at the time, and saw him sign that part of it; that Bingham told her in the presence of Skinner that the paper was a codicil; that the attestation clause of both the will and codicil was read over to her before she signed. On cross-examination she stated that she did not know whether Mr. Skinner signed the will or not; that she could not remember whether he spoke at all, or did anything to indicate his approval, or that Mr. Bingham said anything while the matter was being arranged; that at the time she signed she did not see the name of R. L. Skinner at the bottom of the will, but that she thought she saw him sign the codicil before she signed; that Skinner at no time requested her to sign either the will or codicil as a witness; that she could not say whether Skinner signed the will or not,—could not remember; thought she distinctly saw him sign the codicil, but did not see his signature after he wrote it; and that the testator did not request her to sign, but that Mr. Bingham did. When the will was first offered for probate, Mrs. Hughes signed the usual affidavit required for making proof in common form, whereby she deposed that she saw the testator subscribe both the will and codicil and that she signed as a witness at his request and in his presence.

From this evidence we are to determine the fact of attestation. Counsel frankly say that Mr. Bingham's evidence, if standing alone, is *prima facie* sufficient to establish a due execution; but they insist, inasmuch as the proponent elected to call Mrs. Hughes, and through her the fact was elicited that

she was unable to testify that the testator placed his name upon the identical paper to which her name was attached, her incompetency as an attesting witness was clearly shown. We speak now of the will only. It is a significant fact that Mrs. Hughes fails to say that the testator did not sign the will prior to her signing as a witness. She simply says that she does not remember that such was the case; thus leaving the implication or inference that the signing may have been done in her presence, but, if it was, she has forgotten it. The attestation clause refutes the idea that the testator did not sign in her presence and prior to her signing, and her affidavit in proof of the will bears quite as strongly in the same direction. Mr. Bingham's testimony is far more satisfactory. He is an attorney of learning and skill, and was employed to put the will in form, and in that connection attended to its execution. His positive declarations show that all the formalities were observed requisite to a due attestation, so that there is a clear preponderance of the weight of testimony in support thereof. Does the circumstance that Mrs. Hughes herself was unable to recall the necessary accompanying details vitiate it? The answer must be in the negative. The attestation, it is true, is not a matter of mere formality in affixing one's name to the will as a witness. There must be an active mentality connected with it. The witness must take cognizance of the signature of the person executing, either by seeing him write or by his acknowledgment of it in some manner, either expressly or impliedly, so that he can be able to say surely and unequivocally that the signature to the instrument is that of the person executing, previously appended. But the attestation of the will does not depend upon the memory of the attesting witness. The act is one, when once performed, which stands as an accomplished fact, and any subsequent failure of the memory of the witness, or willful purpose in suppressing what is known to have transpired, does not change or obliterate it. It may perchance stand unsubstantiated after applying the test of legal proof; but, if it once existed, it stands for all time as any other fact.

Further than this, the law comes to the aid of substantiation, in many cases where the memory of the witnesses is defective in being unable to recall all the attending circumstances, by invoking the presumption of a due observance of the formalities required by law. Thus, in *Allen v. Griffin*, 69 Wis. 529 (35 N. W. 21), it was held that, in the absence of clear proof that the witnesses signed before the testator affixed his signature, it should be presumed that the testator signed first. And, again, it is said that "on the death of the witnesses, or on the failure of their memory, the proof of the fact of execution begets the presumption that all the details of statutory requirements were complied with, * * * unless the contrary be proven": Beach, Wills, § 39. See, also, 1 Greenleaf, Ev. (15 ed.) 38a; 1 Jones, Ev. § 44. Accordingly, in the case of *In re Tyler's Estate*, 121 Cal. 405 (53 Pac. 928), where the signature of the testatrix and that of a deceased witness were proven, and the remaining witness, being called, identified his own signature, but could not remember whether the testatrix actually signed or verbally acknowledged her signature in his presence, or whether she declared the document to be her will or requested him to sign as an attesting witness, it was held that the proof was sufficient to authorize probate. So, in *McKee v. White*, 50 Pa. 354, where one of the witnesses, as in this case, recollected all about the execution, and testified that he wrote the will, subscribed it as a witness at the request of the testator, and thought the other witness, whom he called in for the purpose, subscribed it at the same time, but the second witness could not remember that he saw the testator sign, or who called him to be a witness, and that he did not hear anything said about the will, it was held sufficient to establish due execution. And, in the case of *Rugg v. Rugg*, 83 N. Y. 592, one of the witnesses, after stating that the testator signed after he did, subsequently expressed a doubt upon the subject and admitted that he might have been mistaken. The other testified that he did not remember that the testator signed last, and in further course of his examination stated that he (the witness) was the last to sign. To supply this equivocation or lapse of memory,

the executor, who was apparently not an attesting witness, testified distinctly to all that took place, the order in which the several acts were done, and that the testator subscribed before the attesting witnesses. Upon this showing it was held that the preponderance of the proof was in favor of a proper execution of the will, and that the surrogate could not come to any other conclusion; the court, speaking through Mr. Justice MILLER, saying: "Where there is a failure of recollection by the subscribing witnesses, the probate of the will cannot be defeated if the attestation clause and the surrounding circumstances satisfactorily establish its execution,"—citing *In re Kellum*, 52 N. Y. 517. These cases, of singular analogy to the one at bar, are sufficient to illustrate the principle upon which the fact of attestation and the due execution of a will may be established; and where, by reason of a failing memory, a witness is unable to recall the fact as to whether he or she saw the testator sign, or whether the testator signed first or last, or whether the witness was requested by the testator to attest the writing, the hiatus is supplied, in the absence of positive testimony to the contrary, by a presumption that the requirements of the law have been observed, which completes the proof and renders it sufficient upon which to direct a probate. And this is especially so where accompanied by an attestation clause reciting an observance of the necessary statutory formalities: *Allarie v. Allarie*, 37 N. J. Law, 312; *McCurdy v. Weall*, 42 N. J. Eq. 333 (7 Atl. 566).

12. As it pertains to the request by the testator to sign as an attesting witness, there need be but little further said. Mrs. Hughes frankly admits that Mr. Bingham called her to witness the will. Mr. Bingham was acting for the testator, and this was a sufficient request for the purpose: *Ames' Will*, 40 Or. 495 (67 Pac. 737). The request is but a step in bringing about the attestation, and, where the witness has signed as such, but slight evidence is required to warrant the assumption that it was done at the testator's instance; and an attestation clause attached, reciting the fact, is amply sufficient to establish it in the absence of a direct assertion that

such was not the case: *In re Nelson's Will*, 141 N. Y. 152 (36 N. E. 3). From these considerations we conclude that the will was properly attested, and should be admitted to probate.

The evidence as to the attestation and the execution of the codicil is manifestly stronger than that relating to the will, and it results, without further comment, that its probate should also follow. The decree of the court below will therefore be affirmed.

AFFIRMED.

Argued 27 January; decided 10 February, 1902.

MACE v. MACE.

[67 Pac. 660, 68 Pac. 737.]

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WATERS—BANKS OF STREAMS—CUTTING NATURAL DEPRESSIONS.

1. Where there is a natural depression in a river bank, with a well-defined channel leading therefrom through which the water is accustomed to flow during the irrigating season, thereby rendering the plaintiff's lands highly productive, the waters flowing through such channel partake of the nature of a natural stream to such extent that defendant cannot, by damming up such outlet, divert such water to plaintiff's injury: *Cox v. Bernard*, 39 Or. 53, cited.

WATERS—CONTROL OF ARTIFICIAL WORKS.

2. When plaintiff's rights as to a stream are only those of a riparian proprietor, and are not based on contract or usage, the court cannot decree the maintenance and regulation of artificial works constructed by defendant, but only the restoration and maintenance of the natural condition.

IDEM—APPEAL—MODIFYING DECREE.

3. Where, in an action to restrain the obstruction by artificial works of the flow of water through a natural depression in the bank of a stream, it is claimed that such works could be maintained with great benefit to defendant, and without injury to plaintiff, during a portion of the season, but the evidence and findings do not show during what times this might be done, the appellate court should not modify an injunction decree so as to permit such works to be maintained at any time, but will leave such matter for the trial court.

From Harney: MORTON D. CLIFFORD, Judge.

Suit by Homer B. Mace against F. L. Mace for an injunction. The facts appear in the opinion. There was a decree for plaintiff, and defendant appeals.

MODIFIED.

For appellant there was a brief over the name of *Parrish & Rembold*, with an oral argument by *Mr. Chas. W. Parrish*.

For respondent there was a brief and an oral argument by *Mr. Lionel R. Webster*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

The object of this suit is to restrain the defendant from interfering with the flow of water from Silvies River onto plaintiff's land through an alleged natural channel. Some four or five miles below where the river debouches into Harney Valley it divides into two branches, called respectively the "East" and "West" Fork. From this point down to Malheur Lake the East Fork has a fall of not to exceed one and one half feet to the mile, and its banks are somewhat higher than the land a short distance from the river. The land lying between the forks, known as the "Island," is naturally irrigated, during the spring freshets, by the water from the river flowing out through natural sloughs or depressions. It is very productive when so irrigated, but valueless without. The defendant owns one hundred and sixty acres on the East Fork, a short distance between where it branches from the main river; and the plaintiff owns a like quantity of the "Island" land, south of and adjoining that of the defendant, and situated about a quarter of a mile from the East Fork. At the upper end of the defendant's land there is, and has been from time immemorial, a natural depression or slough, through which the water has been accustomed to flow during high water onto plaintiff's land, and from thence gradually finding its way to the river and lake below. In 1888 the defendant, with the permission and consent of the predecessors in interest of the plaintiff, constructed a ditch from a point on or near the south line of the land now owned by plaintiff and onto another tract belonging to him, for the purpose of utilizing the surplus water from plaintiff's land for irrigating purposes, and at the same time put in the bank of the river at the head of the slough a box or flume two feet deep and four feet wide, filling up the depression on either side, and by means of adjustable dams above and below, constructed by himself and one Levins, raising the water in the stream so that it flowed out through the box or flume in greater quantities

and later in the season than it was accustomed to do when the river and bank were in their natural condition. In 1898 he replaced this box with a larger one, four feet deep, four feet wide, and sixteen feet long, but no water was ever taken through it, because in the spring of 1898 he caused it to be closed up, and made arrangements to obtain water for irrigation on his lower tract by means of a ditch tapping the river further down. This suit was commenced in 1899 to prevent defendant from interfering with the flow of water through the slough or depression referred to. The complaint alleges, in effect, the facts as above stated. The answer denies its material allegations, except plaintiff's title, and avers that what plaintiff asserts to be a natural slough is nothing more than a ditch made by the defendant for the purpose of turning water through and over the plaintiff's lands and onto the lands owned by him below. The court found that the slough or depression referred to was and is a natural water course, and that plaintiff was entitled to have such a quantity of water flow through it as would naturally flow through the head gate put in by the defendant in 1898, when raised four inches above the bottom of the flume, and entered a decree to that effect, giving the plaintiff the right to enter upon the lands of the defendant at any and all times to repair the head gate and to regulate the flow of water through the same, and, if necessary, to construct a new line in lieu thereof. From this decree the defendant appeals.

There are substantially but two questions presented by the record: (1) Whether the depression or slough near the upper line of defendant's land is a natural water course; and (2) if so, to what relief is the plaintiff entitled?

1. Upon the first question there is considerable testimony. It is substantially agreed, however, by the witnesses on both sides that from time immemorial there has been a natural slough or depression at the point referred to from fifteen to twenty feet wide, through which the water was accustomed to flow annually during the high water in the spring, until obstructed by defendant, and by which the plaintiff's land was

irrigated and made to produce large and valuable crops of wild hay. Mr. Philbrick, an engineer of intelligence and experience, who made a survey and plat of the premises with a view to testifying in this suit, says that there was a depression in the ground at the point where defendant's head gate is now situated, which was apparently a natural water course; that for about seven hundred and fifty feet from that point down toward the lands of the plaintiff there is a well-defined crooked channel, about two feet wide on the bottom, and ten feet across at the top, and one and one half feet deep; that water flowing through such channel spreads out over the lands of the plaintiff in the form of a lake or pond for perhaps one thousand feet further down, when it again flows through small cuts or sloughs to a point near the south line of plaintiff's claim, when it is again taken up by a ditch six feet wide and from one and one half to two feet deep, leading down onto the lands owned by the defendant. It thus appears from the testimony of this witness, and he is corroborated by all the other witnesses, that for some distance from the river there is a natural, well-defined channel or ravine, through which the water was accustomed to flow during the irrigating season; and, while it may not be sufficient to conform to the technical definition of a water course as given in some of the books, yet, taking into consideration the nature and character of the river and country, and the manner of irrigation, we think that the water flowing through it must be held to partake more of the nature of a natural stream than of ordinary overflow or surface water, and is governed by the rules applicable to waters flowing in such streams, to the extent, at least, that the defendant cannot, by damming up the outlet and changing the banks of the stream, interfere with or divert the water which would naturally flow through such depression, to the injury of the plaintiff: *West v. Taylor*, 16 Or. 165 (13 Pac. 665); *Gould, Waters*, § 264; *Cox v. Bernard*, 39 Or. 53 (64 Pac. 860).

The next question is as to the decree that should be entered under the circumstances. The defendant, as a riparian proprietor, is entitled to have the water of the stream flow as

it was wont to do under natural conditions, and to that end he has a right to maintain the banks at their usual or natural height: *Cox v. Bernard*, 39 Or. 53 (64 Pac. 860). So that this branch of the case turns upon the proof as to the size and depth of the depression or slough at the point where it leaves the river, and, when that is ascertained, the defendant should be compelled to restore the bank to its natural condition. The evidence regarding the depth of the slough varies according to the recollections of the witnesses, and tends to show that it was from six inches to two and one half feet deep. But without incumbering this opinion with quotations from the testimony, which consist largely of the recollection of witnesses of observations made many years ago, it is sufficient to say that we are of the opinion that the probable average depth was about two feet. This conclusion is reached largely from the fact that the head gate or flume put in by the defendant in 1888 was evidently intended to be about the same depth as the natural depression in the bank, and, aided by the dams put in at the same time, to carry about the same amount of water. It was so used for ten years without objection from any one, and seems to have been entirely satisfactory to all concerned. The amount of extra water caused by the dams is not shown by the testimony, nor can it be considered in determining the questions involved in this case. The dams are the property of the defendant and Levins, and their future maintenance depends wholly upon the pleasure of their owners. The case in hand must be determined without reference to these artificial structures, and, when so considered, we are of the opinion that, if an opening two feet deep and fifteen feet wide is left in the bank at the place where the head gate is now situated, it will practically restore the bank to its natural condition.

2. The decree of the court below would doubtless afford substantial justice between the parties if it was believed to be within the authority of the court to make, but the plaintiff is not entitled to the waters of the stream by virtue of any contract with the defendant, or by prior appropriation. His rights depend alone on the fact that he is a riparian proprietor

upon a natural water course, and all that he is entitled to is a decree restoring such water course and its intake to their natural condition. The court has no authority in this suit to make a decree allowing or permitting him to maintain a head gate or flume in the bank of the river on the defendant's land, nor to go upon such land for the purpose of regulating the flow of water. All it can do is to compel the defendant to restore the bank to its natural condition, and permit it so to remain.

A contention is made that, because the permanent part of the dam put in by the defendant is about two feet high, he is entitled to raise the bank at the head gate at least eighteen inches. But the evidence shows that a very slight raise in the water at the point where the dam is located will cause the stream to flow back and through the West Fork, unless prevented by what is known as the "Levins Dam," over which neither party to this suit has any control. And, moreover, as already suggested, the dam is an artificial structure, put into the stream by the defendant, and its future maintenance depends entirely upon his will.

A decree will be entered here in accordance with this opinion, and the cause remanded to the court below, with directions to enforce such decree; plaintiff to recover costs in this court and the court below.

MODIFIED.

Decided 28 April, 1902.

ON MOTION FOR REHEARING AND FOR MODIFICATION OF DECREE.

MR. CHIEF JUSTICE BEAN delivered the opinion.

3. The defendant moves for a modification of the decree heretofore entered, so as to permit him to raise the bank of the stream at the place where the cut is directed to be made whenever he raises the water by artificial means; the purpose being to permit him to confine the water within the channel when it is raised by means of the dams erected by himself and Levins. In support of the motion, it is said that a great portion of the time during the irrigating season the water will not be high enough to run out through the natural channel; that during

such times defendant can use it for irrigating his riparian lands by raising it by means of artificial dams, but in order to do so it will be necessary to close the cut referred to during the times he is so using the water. This point was not developed by the testimony, nor does the record show, except in a general way, at what time of the year the water will naturally flow down to plaintiff's land. The court below found that annually, from about the first of April to July 15, the water has from time immemorial run down through the natural channel referred to, but as to whether the flow is continuous or not the evidence and findings are silent. If the defendant's position is correct, it would perhaps be equitable and just to allow the desired modification, if, under the facts, a decree could be so framed as to protect the rights of the plaintiff. But to permit defendant to determine for himself when he may raise the bank would, it is believed, tend to further litigation, and, in practical effect, destroy the value to the plaintiff of the decree heretofore rendered. If, when the case goes back to the court below for enforcement of the decree, it is made to appear to that court that a decree can be framed fixing definitely the date or dates when the defendant can raise the bank without interfering with the rights of the plaintiff, it is authorized, if it deem it proper, to frame such a decree.

The petition for rehearing and motion for modification of the decree are denied and overruled, except as above indicated.

REHEARING DENIED.

Argued 4 February; decided 24 February, 1902.

CLOSE v. RIDDLE.

[67 Pac. 932.]

NOTES—HIGHER INTEREST AFTER DEFAULT—LIQUIDATED DAMAGES.

1. A provision in a promissory note that if the note shall not be paid at maturity it shall thereafter bear a specified higher rate of interest than before maturity (such higher agreed rate being less than the highest legal rate) is not an agreement for a penalty, and not properly enforceable in equity, but it is rather an agreement for liquidated damages, which the parties are at liberty to make if they choose.

40	502
43	312
43	512

MORTGAGE FORECLOSURES—DISPOSAL OF EXCESS OF PROCEEDS.

2. A direction in a mortgage foreclosure proceeding that the excess of the proceeds of the sale of the mortgaged property over the sum necessary to satisfy the mortgage be deposited in court subject to its final order is not reversible error, though Hill's Ann. Laws, § 417, provides that foreclosure sales shall be conducted in the same manner as execution sales; and section 296, subds. 3, 5, direct that the proceeds of an execution sale shall be paid to the clerk, who shall pay the excess, over the sum necessary to satisfy the judgment, to the judgment debtor.

From Douglas: JAMES W. HAMILTON, Judge.

This is a suit by Chas. W. Close to foreclose a mortgage. The complaint, so far as material to the questions involved, alleges, in substance, that on May 1, 1888, the defendants George W. Riddle and Helen, his wife, executed a bond to the Lombard Investment Company, a corporation, for the sum of \$11,000, due in five years, with interest at the rate of six per cent. per annum, payable semiannually, evidenced by ten coupons of \$330 each, and stipulating that the debt should bear interest after maturity at the rate of eight per cent. per annum; that at the same time they and Wm. H. Riddle, to secure the payment of said principal and interest, executed to the said company a mortgage upon certain real property in Douglas County, which mortgage, after being duly recorded, was assigned, with said bond, to the plaintiff, who is the owner thereof; that William H. Riddle died testate April 4, 1891, having devised to George W. Riddle and his wife all his interest in said real property, and, his will having been admitted to probate, his estate was duly settled; that the other defendants claim some interest in the mortgaged premises, but their rights, if any, are subordinate to plaintiff's; that no part of said debt has been paid except the coupons and the sum of \$1,500, on the principal and the interest thereon to June 1, 1897; and prays for the recovery of the sum of \$9,500, with interest from that date at the rate of eight per cent. per annum, and for a decree foreclosing the lien of said mortgage. The defendant Walter S. Riddle, alone answering, admits the execution of the bond and mortgage, but denies that there is due thereon the sum of \$9,500, with

interest at the rate of eight per cent. per annum, or any greater sum than \$7,800. For a separate defense he alleges that on July 28, 1891, the defendants George W. Riddle and his wife executed to Stilly Riddle their mortgage upon said premises to secure the sum of \$7,500, and they also conveyed a part of said premises to W. H. Taylor, whereupon Stilly Riddle released the lien of his mortgage upon the land so conveyed, and thereafter assigned his mortgage to this defendant, who secured a decree foreclosing the same, in pursuance of which the remaining premises were sold to him, and, the sale having been confirmed, a sheriff's deed therefor was executed to him; that the title to the premises so conveyed to Taylor has passed by *mesne* conveyances to the defendants Samuel Parmley and Clara S., his wife; that on August 19, 1899, this defendant paid on account of the bond so assigned to plaintiff the sum of \$600; and that the stipulation in the bond and mortgage to pay eight per cent. interest on the debt after its maturity is void; and prays that the land so conveyed to Parmley and wife be first sold, and the proceeds arising therefrom applied upon plaintiff's demand, and, if sufficient to satisfy the same, that the premises so owned by this defendant be freed from the lien of said mortgage. The reply having put in issue the allegations of new matter in the answer, a trial was had, and the court found that, after giving said defendant credit for the sum of \$600, there remained due on the bond the sum of \$11,270.76, and decreed a foreclosure of the mortgage and a sale of the premises, the part so conveyed to Taylor to be sold first, and that, if any of the proceeds thereof remain after the payment of the sum so found due plaintiff, it be deposited in court to be paid out on its further order, and the defendant Walter S. Riddle appeals.

AFFIRMED.

For appellant there was an oral argument by *Mr. J. C. Fullerton*, with a brief to this effect:

The respondent's mortgage provides that in case of a default of payment of any sum covenanted therein to be paid for the period of thirty days after the same becomes due, or in default

of the performance of any covenant therein contained, the first party agrees to said second party and its assigns to pay interest at the rate of eight per cent. per annum computed semiannually on said principal note from the date thereof to the time when the money shall be actually paid. The attempted enforcement of the covenant is a penalty which a court of equity will not permit: *Mason v. Callender*, 2 Minn. 350 (72 Am. Dec. 102); *Kurtz v. Robbins*, 12 Wash. 7 (40 Pac. 415, 50 Am. St. Rep. 871, and note); *Spear v. Smith*, 1 Denio, 465; *Hogg v. McGinness*, 22 Wend. 163; *Neven v. Rossman*, 18 Barb. 50; *Gregg v. Crosby*, 18 Johns. 219; *Curry v. Lance*, 7 Pa. St. (Barr.) 400.

For respondent there was an oral argument and a brief by *Mr. Milton W. Smith*, to this effect:

An increased rate of interest after maturity is not a penalty, but is always recoverable where it is expressly stipulated for in the note: 3 Randolph, Com. Paper, § 1713; 2 Daniel, Neg. Inst. (3 ed.) § 1458a; 11 Am. & Eng. Ency. of Law (1 ed.), pp. 416, 417; *Finger v. McCaughey*, 114 Cal. 64; *Wortman v. Vorhies*, 14 Wash. 152; *Kurtz v. Robbins*, 12 Wash. 7 (40 Pac. 415, 50 Am. St. Rep. 871); *Hallam v. Telleren*, 55 Neb. 255; *Sheldon v. Pruessner*, 52 Kan. 579, 592; *Davis v. Hendrie*, 1 Mont. 499; *McKay's Estate v. Belknap Sav. Bank*, 27 Colo. 50 (59 Pac. 745); *Vermont L. & Trust Co. v. Dygert*, 89 Fed. 123; *Scottish Amer. Mtg. Co. v. Wilson*, 24 Fed. 310.

MR. JUSTICE MOORE, after stating the facts, delivered the opinion of the court.

1. It is contended by appellant's counsel that the stipulation in the bond and mortgage for the payment of eight per cent. interest after the maturity of the debt is a penalty designed to secure the payment of a lesser rate of interest, and, this being so, it should not be enforced in equity, and that the court erred in decreeing the recovery of more than six per cent., and cites in support of the principle insisted upon the case of *Mason v. Callender*, 2 Minn. 350 (72 Am. Dec. 102), in

which it was held by the Supreme Court of Minnesota that an agreement to pay a greater sum on default in the payment of a lesser was a penalty, and not liquidated damages, and could not be recovered, and that this rule applies to a stipulation in a note providing for an increased rate of interest after maturity upon both principal and interest. While the decisions upon this subject are not uniform, we think the great preponderance of authority supports the rule that, where a higher rate of interest is expressly reserved to be paid after maturity, the rate so stipulated is recoverable if not usurious: 2 Edwards, Bills & N. § 1005; 3 Randolph, Com. Paper (2 ed.), § 1713. The editors of the American and English Encyclopædia of Law [vol. XVI (2 ed.), p. 1049], in discussing this question, say: "By the weight of authority a stipulation for a higher rate of interest after maturity is valid and enforceable, provided the increased rate which it is sought to recover does not exceed the highest rate allowed by law; and, in the absence of a statute limiting the rate which may be contracted for, or where the rate provided for after maturity is not unlawful, a stipulation for a higher rate after maturity will generally be considered as a liquidation of the damages, rather than as a penalty for a breach." The statute of this state permits the recovery of ten per cent. interest per annum by express agreement of the parties (Hill's Ann. Laws, § 3587); so that the stipulation in the bond and mortgage to pay eight per cent. interest per annum after maturity is not usurious. Interest is compensation for the use or forbearance of money, or for withholding from or depriving a party of money: 16 Am. & Eng. Ency. Law (2 ed.), 990.

Interest proper would seem to be the compensation agreed to be paid by the borrower to the lender for the use of money to be paid at a future day, while the compensation awarded by law for the forbearance or withholding money is denominated "damages," the measure of which is established at a given rate. The statute prescribing the rate of compensation by way of damages is as follows: "The rate of interest in this state shall be six per centum per annum, and no more, on all moneys

after the same become due; on judgments and decrees for the payment of money; on money received to the use of another and retained beyond a reasonable time without the owner's consent, express or implied, or on money due upon the settlement of matured accounts from the day the balance is ascertained": Hill's Ann. Laws, § 3587, as amended October 14, 1898 (Laws, 1898, p. 15). It will be observed that the statute employs the word "interest" instead of "damages," but the term so selected cannot change the character of the compensation awarded; for after the breach of a contract interest is never recoverable except as damages: *Seton v. Hoyt*, 34 Or. 266 (55 Pac. 967, 43 L. R. A. 634, 75 Am. St. Rep. 641); *Mason v. Callender*, 2 Minn. 350 (72 Am. Dec. 102); *Jourolmon v. Ewing*, 80 Fed. 604 (26 C. C. A. 23); *Brainard v. Jones*, 18 N. Y. 35. In the case at bar, the makers of the bond having neglected to pay the sum due thereon at maturity, damages necessarily resulted, which should be measured, in the absence of any stipulation to the contrary, by the rate specified in the bond as compensation for the use of the money prior to the breach of the contract: Hill's Ann. Laws, § 3591. Such damages, however, are properly anticipated and adjusted by the parties, and, if the rate thus agreed to be paid for the use of money after maturity does not exceed the highest rate prescribed by law, the agreement, by the great weight of authority, is for liquidated damages, and not in the nature of a penalty, and, the parties having agreed upon the payment of a rate recoverable by express contract, no error was committed in assessing the damages so agreed upon.

2. It is maintained that the appellant was entitled to the remainder of the proceeds arising from a sale of the mortgaged premises after satisfying the sum found to be due the plaintiff, and hence an error was committed in decreeing that such remainder should be deposited in court subject to its further order. It will be remembered that Samuel Parmley and wife owned a part of said land in fee, subject to plaintiff's mortgage, which was decreed to be sold first. If the sum realized from such sale was more than sufficient to satisfy plaintiff's

decree, no necessity would exist for a resort to the appellant's land, and the remainder of the proceeds, if any, would belong to Parmley and his wife; but, if insufficient for that purpose, and the sale of appellant's land became necessary, any sum that remained after paying plaintiff the amount of his decree would belong to the appellant. A sale of real property under a decree of foreclosure is conducted in the same manner as a sale thereof under an execution in an action: Hill's Ann. Laws, § 417. Upon a return of the execution the sheriff shall pay the proceeds of the sale to the clerk, who shall then apply the same, or so much thereof as may be necessary, to the satisfaction of the judgment; and, if any of the proceeds then remain, the clerk shall pay the same to the judgment debtor or his representative: Hill's Ann. Laws, § 296, subds. 3, 5. It is quite probable that, if the decree had been silent in respect to the payment of such remainder after the satisfaction of plaintiff's demand, the clerk would have been authorized to pay the same to the party entitled thereto. It would undoubtedly have been better practice if the decree had designated the party to whom it should be paid; but, as the undertaking on appeal did not stay the enforcement of the decree, it is possible that a sale of the premises may have been made, and, if so, and any remainder exists, the necessity of securing the court's order therefor, as prescribed in the decree, if erroneous, is not, in our judgment, so prejudicial as to require a modification thereof.

There are other errors alleged, but we do not consider them of sufficient importance to require consideration, and hence the decree is affirmed.

AFFIRMED.

Argued 10 February ; decided 24 February, 1902.

ALTREE v. GREGSON.

[67 Pac. 921.]

WHAT CONSTITUTES AN "OPEN MUTUAL ACCOUNT"—COSTS.

A mutual account is one involving reciprocal demands—and an open account is one not stated or agreed upon ; from which it is apparent that an account on which payments have been made, but against which there are no counter demands, is an open but not a mutual account, and a judgment for less than \$50 on such a claim does not carry costs, under Sections 549 and 551 of Hill's Ann. Laws.

From Lincoln: GEORGE H. BURNETT, Judge.

Action by J. C. Altree against Moses Gregson, resulting in a judgment for plaintiff for \$40.79 and costs, from which defendant appeals. REVERSED.

For appellant there was a brief and an oral argument by *Messrs. C. E. Hawkins* and *H. C. Watson*.

For respondent there was a brief and an oral argument by *Messrs. B. F. Swope* and *B. F. Jones*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is an action to recover money. The complaint contains four separate causes of action: First, it is alleged that in pursuance of a written contract the plaintiff cut and delivered to the defendant 203,466 feet of saw logs, of the stipulated value of \$2.50 per thousand, amounting in the aggregate to \$508.66, no part of which has been paid, except the sum of \$441.55, leaving a balance unpaid of \$67.11 ; the second and third causes of action are for labor alleged to have been performed by the plaintiff and one Oliver Altree for the defendant in July, 1900, of the reasonable value, in the aggregate, of \$24 ; and the fourth is for money alleged to have been paid out and services rendered by the plaintiff for the defendant in scaling the logs referred to in the first cause of action. The answer denies all the material allegations of the complaint, and for a further

and separate defense alleges that between the ——— day of August, and the ——— day of September, 1900, the plaintiff cut and delivered to the defendant, as provided in the contract set up in the complaint, 176,647 feet of saw logs, and no more, of the aggregate value of \$441.60, and that before the logs were scaled the defendant advanced and paid to the plaintiff thereon \$459.21,—being \$17.76 in excess of the amount due the plaintiff on said contract,—for which sum the defendant asks judgment. A reply having been filed, the cause was tried upon the issues thus joined, and the jury returned a verdict in favor of the plaintiff for \$40.79. Thereafter, on motion of the plaintiff, judgment was rendered in his favor for the amount of the verdict and the costs and disbursements of the action. From this judgment the defendant appeals on the ground that he, and not the plaintiff, was entitled to judgment for costs.

The question raised on this appeal does not seem to have been presented to the trial court, but nevertheless the defendant is entitled to appeal if the judgment is erroneous, and that depends upon who is entitled to costs and disbursements under the statute. Section 549 of Hill's Ann. Laws provides that costs are allowed of course to the plaintiff on a judgment in his favor "(1) in an action for the recovery of the possession of real property; (2) in an action for fines and forfeitures; (3) in an action involving an open mutual account, where it appears to the satisfaction of the court that the sum total of such accounts of both parties exceeds \$150; (4) in an action for the recovery of personal property; (5) in an action not hereinbefore specified for the recovery of money or damages, when the plaintiff shall recover \$50 or more"; and under section 551 costs are allowed of course to the defendant in the actions mentioned in section 549, unless the plaintiff is entitled to costs therein. As the verdict and judgment in favor of the plaintiff were less than \$50, it is clear that he is not entitled to costs unless the action involved an open, mutual account. An open account is one not stated or agreed upon; and mutual accounts are such as consist of a reciprocity of dealing between the parties, each having a claim against the other for property

sold, services rendered, money advanced, etc. A mere payment by one party to a contract is not sufficient to constitute such an account: 1 Cycl. Law & Proc. 363; *Lockwood v. Hansen*, 16 Or. 102 (17 Pac. 575); *Purvis v. Kroner*, 18 Or. 414 (23 Pac. 260). Now, there were no reciprocal dealings between the parties to the action, and hence no mutual charges. Under a contract with the defendant, the plaintiff cut and delivered to him a certain quantity of saw logs, upon which defendant had made payments amounting in the aggregate to a certain sum; but, under all the authorities, that did not make the transaction an open, mutual account, within the meaning of the statute. The defendant, and not the plaintiff, was therefore entitled to costs. The judgment appealed from will be reversed as to the award of costs, and the cause remanded, with directions to enter a judgment in accordance with this opinion

REVERSED.

Decided 3 March; rehearing denied 21 April, 1902.

HIRSCH v. SALEM MILLS COMPANY.

[67 Pac. 949, 68 Pac. 733.]

PAROL EVIDENCE TO EXPLAIN WRITING.

1. Where there is an issue in the pleadings as to whether a certain receipt contains the terms of an agreement between the parties, but the question, like other disputes over facts, must be left to a jury.

INTERPRETATION OF RECEIPTS.

2. A receipt that expresses the terms of a contract cannot be varied by parol, of course, but if it does not express the agreement of the parties, the real facts may be shown; and if the terms are vague or ambiguous, the surrounding circumstances may be reviewed to make clear the situation of the parties.

From Multnomah: ALFRED F. SEARS, JR., Judge.

Action by Sol. Hirsch and others against the Salem Flouring Mills Company. Judgment for defendant, and plaintiffs appeal.

REVERSED.

40	601
48	11

For appellants there was a brief over the name of *Dolph, Mallory, Simon & Gearin*, with an oral argument by *Mr. John M. Gearin*.

For respondent there was a brief and an oral argument by *Mr. Sanderson Reed*.

MR. CHIEF JUSTICE BEAN delivered the opinion.

This is an action to recover the value of certain wheat alleged to have been sold and delivered by plaintiffs to the defendant. The complaint contains two causes of action, but for the purpose of this appeal it will be necessary to allude to one only, as they are practically the same, except in the matter of dates and amounts. After alleging the corporate capacity of the defendant, and that it is engaged in the business of buying wheat, grinding the same into flour, and doing a general milling business, the complaint avers, in substance, that on the eleventh day of September, 1897, the plaintiffs delivered to it two hundred and twenty-nine and sixteen-sixtieths bushels of merchantable wheat, under an agreement by which the defendant was permitted to mix the same with its consumable stock, grind it into flour, and sell the product on its own account, and pay the plaintiffs, upon demand and payment of two and one half cents a bushel, the market price of such wheat, or deliver on board the cars at Salem a like quantity of equal grade; that upon receipt thereof the defendant immediately converted it into flour, and sold the same in the usual course of business, and appropriated the proceeds to its own use; that on the seventeenth day of October, 1899, the plaintiffs duly tendered to defendant two and one half cents a bushel on the wheat so delivered, and demanded that it pay the market price thereof, or deliver to them the same quantity of good merchantable wheat, but it refused to do either; that at the date of such demand the price of wheat was fifty-five cents a bushel, and the defendant thereby became indebted to the plaintiffs in the sum of \$126.03, no part of which has been paid.

The answer denies all the material allegations of the com-

plaint, except the copartnership of the plaintiffs, the corporate capacity of the defendant, and that the plaintiff duly demanded of it two hundred and twenty-nine and sixteen-sixtieths bushels of good merchantable wheat. For a further and separate defense, it is averred that for more than twenty-five years past the defendant has been and now is doing business as a warehousekeeper at Salem, Oregon, receiving grain in store for hire, and that on or about the eleventh day of September, 1897, it entered into an agreement with plaintiffs by which it received two hundred and twenty-nine and sixteen-sixtieths bushels of wheat as per the terms and conditions of the following written agreement:

“No. 1769.

SALEM FLOURING MILLS Co.,
SALEM, Oregon, Sept. 11, 1897.

Received in store for account of Fleischner, Mayer & Co., two hundred and twenty-nine and sixteen-sixtieths bushels of merchantable wheat in bulk, subject to their order (damages by the elements excepted), on or before the first day of July, next, on payment of two and one half cents per bushel storage, and three and one half cents per bushel for sacks, and the return of this receipt properly endorsed. The wheat being deliverable on boat or cars sacked. It is understood and agreed that the Salem Flouring Mills Co. are to have the first refusal of said wheat.

SALEM FLOURING MILLS Co.,

Bushels, 229 $\frac{16}{60}$.

Per HOLLAND.”

It is then stated that it was the custom among warehousemen to store grain so received in bulk with other grain of similar grade and character, and the wheat mentioned and referred to in the complaint was delivered by plaintiffs and received by defendant as a warehousekeeper in accordance with such custom and terms and conditions of the agreement referred to, which was duly executed by defendant, and delivered on the day it bears date to the plaintiffs, and received and accepted by them.

The reply denies the material allegations of the answer, except the execution and delivery of the receipt set out in the answer; “but alleges that said receipt does not contain, and was not intended or understood by the parties thereto to con-

tain, all the terms of the agreement entered into between plaintiffs and defendant, in and by which the defendant received the said wheat; that at the time said wheat was so received by the defendant it was understood and agreed that defendant should have the right, as set out in plaintiffs' complaint, to grind the same into flour, or sell or dispose of the same, at the pleasure and convenience of defendant, and the defendant was to account for the same to the plaintiffs in the manner set out in plaintiffs' complaint." The reply contained other allegations to the effect that the receipt set out in the answer did not and was not intended or understood by the parties to contain all the terms of the agreement under which the wheat was received and accepted; but, on motion of the defendant, they were all stricken out, and judgment rendered in its favor on the pleadings, from which the plaintiffs appeal.

1. The judgment of the court below seems to be based on the theory that the wheat receipt set out in the answer constituted the entire contract between the parties, and could not be contradicted or varied by parol. But an error of this position lies in the fact that under the pleadings there is an issue as to whether this receipt contained the terms and conditions upon which the wheat was delivered by plaintiffs and received by defendant. It is not signed by the plaintiffs, and could only become a contract by being received and accepted by them as such, and this they deny. As the pleadings stand, the defendant alleges that the contract under which it received the wheat mentioned in the complaint is embodied in the written instrument, while the plaintiffs deny that such instrument contained, or was intended or understood by the parties to contain, all the terms of the contract between them. An issue of fact is thus presented which can only be determined by a trial and upon testimony.

2. A receipt issued by a warehouseman and accepted by the owner of the commodity stored, as expressing the terms and conditions upon which it was delivered and received, is a contract, and, like all other written contracts, cannot be contradicted or varied by parol [*Marks v. Cass County Elev. Co.* 43 Iowa, 146; *Goodyear v. Ogden*, 4 Hill, 104; *Thompson v.*

Thompson, 78 Minn. 379 (81 N. W. 204, 543); but when the receipt is silent as to the terms of the contract, it may be shown by parol [*State v. Stockman*, 30 Or. 36 (46 Pac. 851)]; and when its language is ambiguous and uncertain, it must, like any other contract, be interpreted in the light of the surrounding circumstances: *McCabe v. McKinstry*, 5 Dill. 509 (Fed. Cas. No. 8,667); *Ledyard v. Hibbard*, 48 Mich. 421 (12 N. W. 637, 42 Am. Rep. 474); *Andrews v. Richmond*, 34 Hun, 20; *Lyon v. Lenon*, 106 Ind. 567 (7 N. E. 311); *Bucher v. Commonwealth*, 103 Pa. 528; *Lonergan v. Stewart*, 55 Ill. 44. Until the question of fact made by the pleadings is determined, it would be useless to express an opinion as to the proper construction of a wheat receipt such as that set out in the answer, if, indeed, it could be intelligently interpreted without proof of the surrounding circumstances.

The judgment will be reversed, and the cause remanded for such further proceedings as may seem proper, and not inconsistent with this opinion. REVERSED.

Decided 23 April, 1902.

• ON MOTION FOR REHEARING.

MR. CHIEF JUSTICE BEAN delivered the opinion.

We cannot agree with counsel that the pleadings admit that the receipt embodied the contract under which the wheat was delivered and accepted. It is admitted that the receipt was issued and delivered, but not as the contract between the parties. The plaintiffs affirmatively allege that it does not contain, and was not intended to contain, all the terms of such contract, and, as it is not signed by the plaintiffs, it could not become a contract binding on them unless it was received and accepted as such. A mere delivery and acceptance would not make it a contract, if accompanied by a stipulation that it did not contain the agreement between the parties; and this, as we understand the pleadings, is asserted by the plaintiffs. Under this interpretation of the pleadings, the petition should be denied, and it is so ordered. REHEARING DENIED.

Argued 7 January ; decided 27 January, 1902.

STONE v. LADD.

[67 Pac. 413.]

SPECIFIC PERFORMANCE—EVIDENCE.

The evidence in this case seems to show that a deceased aunt intended to give her nephew part of her farm, but neglected to do so before her death—it does not satisfactorily show that the transfer was to be in settlement of any debt.

From Multnomah: JOHN B. CLELAND, Judge.

Suit by Hiram S. Stone against William M. Ladd, executor, for the specific enforcement of a contract. There was a decree for defendant, from which plaintiff appeals. **AFFIRMED.**

For appellant there was a brief and an oral argument by *Messrs. Wm. D. Fenton and Wm. Y. Masters.*

For respondent there was a brief over the name of *Milton W. Smith*, with an oral argument by *Mr. Smith*, and *Mr. Wm. L. Brewster.*

MR. JUSTICE WOLVERTON delivered the opinion.

This is a suit to require the specific performance of a verbal contract alleged to have been made and entered into by and between Hannah M. Smith, now deceased, and her nephew, the plaintiff herein, whereby, in the latter part of the year 1892, in consideration of labor and services rendered, an accounting respecting which was then had, she agreed to deed to plaintiff fifty acres of land, being the same described in the complaint. The questions involved are principally of fact, and, the testimony being voluminous, we will be unable to do more than state our deductions in many instances, without an extended discussion of conflicting details.

In 1872 the deceased was the owner of twelve hundred or thirteen hundred acres of land in proximity to Fairview, Multnomah County, Oregon, which she utilized principally as a dairy farm. The plaintiff went upon it in that year, and

remained thereon, caring for the farm, until the spring of 1880, when, as he says, he had a settlement with Mrs. Smith, and that she paid him for his services in land. The land referred to is a one hundred and sixty-acre tract, located near Mount Scott, and was conveyed April 12, 1880, the deed reciting a consideration of \$3,000. The plaintiff subsequently went East, but returned to the farm in April, 1881, where he remained until December, 1883. In the meanwhile, according to his statement, he worked and managed the farm as before for Mrs. Smith; cared for the stock, consisting of one hundred milk cows and twenty-five to forty head of other stock; and his wife did the cooking for the hands employed, numbering from five to thirteen. For this work the plaintiff testifies that his services were worth \$100 and his wife's \$20 per month. He further testifies that from December, 1883, to the year 1892 he performed services for the deceased, at her request, as general superintendent of her farm; that she consulted him frequently during that time, and was desirous that he should keep the run of it,—see what the tenants were doing, etc.,—which he did, and made frequent reports to her; and \$10 per month is claimed for such services for nine years and six months. The farm was occupied during the time by tenants named Lull, Glenn, Rankin, and Arneson. Rankin left the place unexpectedly, and plaintiff was required for a period of about ten days to employ the requisite help and take care of the dairy, which services he states were worth \$75. Soon after he quit the farm in 1883, plaintiff sold and delivered to Mrs. Smith, a span of mules and a horse, which he valued at \$350. Other than the services mentioned, he testifies that he was always doing what he could for her, working and looking out for her business interests as she requested; and that during all this time all he received for his services was a living, which he estimated to have been worth from \$200 to \$300 per annum.

He further testifies that in the latter part of the year 1892, or early in 1893, they had an accounting together, touching all these services; that they “jumped at the amount,” and that she agreed to deed him the land in dispute in settlement

thereof; that he took possession of the whole fifty-acre tract at that time, part of which was in meadow and part in brush. There were twenty-six and sixty-seven hundredths acres of the meadow, but it was usually designated as the "40-acre meadow." This was inclosed, but only twenty-one and sixty-five hundredths acres of it are included in the tract in controversy. The inclosure, by its conjunction with other fencing, part of which plaintiff constructed in 1887, formed another inclosure, containing about six acres, on the east of the meadow, four and ninety-two hundredths acres of which are contained in the fifty-acre tract, and the balance lies north of it. Plaintiff cut brush on this inclosure about 1887. In explanation of how he came to complete the inclosure and to cut the brush, he says that Mrs. Smith had formerly agreed to let him have the land, and that the matter had been talked of for ten years or more. In the spring of 1893 Mrs. Smith leased to one John Thomas all of her farm, saving one hundred and thirty-six acres and a fraction, south of the Oregon Railroad & Navigation Company's railroad, the lease bearing date April 1. Upon the same day plaintiff executed to Thomas a lease for something like one hundred and fifty acres, lying in the bottom adjoining the land of Mrs. Smith, for a term of years identical with the lease given by Mrs. Smith; the expressed consideration being \$1. Thomas understood that he was to get the whole tract, but says that when the lease was drawn the land south of the railroad was left out, and Stone's lease was given to compensate him therefor. This did not serve to satisfy him, however, as later developments indicate, and it was arranged, plaintiff says, by the request of Mrs. Smith, that he should let him have eight tons of hay in the barn and twenty-two tons on the meadow in the shock, which was furnished; and Thomas testifies that he went into possession of the meadow in the fall,—October 1, 1893,—and has remained in possession of it ever since, cultivating it, and taking the hay off, and pasturing it; and has also had such possession of the other lands of Mrs. Smith lying south of the railroad as they were susceptible of, being virtually commons, the fencing having gone down so as

to be of little consequence. Plaintiff says that at the instance of Mrs. Smith he allowed Thomas to turn his stock in on the range and meadow and to take the hay from the meadow every year afterwards, but that he never surrendered his possession of the fifty-acre tract, or any part of it, and that he has always continued in the possession of the six-acre inclosure. Subsequent to the death of Mrs. Smith, Thomas, at the instance of the executor, rebuilt and repaired much of the fencing about the outlying lands, as well as about the meadow, so as to utilize them for pasturage, and cut the brush off the fifty acres lying south and east of the meadow inclosure. It also developed that during the time since the latter arrangement plaintiff has been permitted to turn his stock upon the bottom land, while at the same time he and Thomas have been pasturing their stock conjointly, more or less, upon the land south of the railroad and within the meadow inclosure.

On May 7, 1896, Mrs. Smith wrote to plaintiff as follows:

“Dear Hiram: To get that land matter settled up, you may survey out the fifty acres for yourself,—this to include that notch into Bowman’s farm, and enough besides to make up the fifty acres in a straight line so as not to leave a notch on my land.”

In pursuance of this letter plaintiff employed a surveyor, and had the land surveyed and platted. Mrs. Smith was made aware of the survey, and expressed herself as satisfied with it, but the execution of the deed was deferred from time to time, and she died without making it. Plaintiff is supported in a manner in his statement touching the agreement of Mrs. Smith to deed him the land through her admissions. Albert Stone, a brother of the plaintiff, says she told him in June prior to her death—she having died in October, 1896—that she had a bargain with Hiram, and that she had agreed to deed him the piece of land in controversy for services rendered; and Mrs. Redclift, G. R. Shaw, and Andrew Snover testify to admissions of like character. E. Arneson testifies that Mrs. Smith told him that she intended to make such a conveyance to Stone for his services while he (witness) occupied the place, which was prior

to the alleged settlement and agreement to make the deed. Some inconsistent admissions are shown, but, not being against her interests, they are in the nature of self-serving declarations, and we have not considered them. Plaintiff's contention, however, is much shaken by the testimony of Mr. Milton Smith, who had long been the attorney and adviser of Mrs. Smith, and who relates that plaintiff came to him after her death with the letter of May 7, and claimed to him at that time that Mrs. Smith had agreed to exchange this tract with him for his land lying in the bottom, being the same that he had leased to Thomas; but said, however, that it was not his intention to make any trouble; that he came to see about the survey, and wanted the estate to pay for it; that he had previously sent Judge McArthur to him to have the exchange made, who produced the letter, or a copy of it, at the time; and that an exchange of the eighty acres never was in fact talked of, nor did he ever make mention to him of any accounting with Mrs. Smith. Plaintiff admits sending Judge McArthur to Mr. Smith with the letter, but says that his talk with Smith touching an exchange of land was with reference to the eighty-six-acre tract, and not the land in dispute. This suit was begun May 13, 1899, and Smith says he never had any intimation of plaintiff's present claim until the complaint was filed. On January 21, 1891, Mrs. Smith made another conveyance to plaintiff of eighty-two acres, being part of the bottom land which was leased with other land by plaintiff to Thomas, the consideration named in the conveyance being \$3,000. Plaintiff says that this conveyance was intended as a gift to his oldest son, but that at his request it was deeded to him so that he might be able to use it.

We are not satisfied, after a careful and painstaking survey of the testimony adduced, that the plaintiff has established a sufficient consideration to support the alleged verbal agreement by Mrs. Smith to deed the tract of land in controversy to him; and he must fail, as, without a consideration, specific performance cannot be enforced. If we accord to plaintiff the

full amount that he claims for services rendered Mrs. Smith, we have a statement of this nature:

For services from April, 1881, to December, 1883, at \$120 per month..	\$3,840
From December, 1883, to the alleged settlement, 9 years and 6 months, at \$10 per month.....	1,140
For taking care of stock 10 days while Rankin was a tenant.....	75
Value of mules and horses.....	350
Aggregating	\$5,405

During all this time plaintiff had a living for himself and family, which he says was worth from \$200 to \$300 per year. Placed at \$300, which is probably not unreasonable, for twelve years and two months, would amount to \$3,650, which, being deducted from the \$5,405, leaves a balance in plaintiff's favor of \$1,755. So that, reduced to its final result, this sum would represent the consideration. But plaintiff names no sum as the result of their accounting. He says that they "jumped at the amount," as they had always done, and Mrs. Smith, to compensate him, agreed to deed the land. The only prior settlement alluded to is the one made about April 12, 1880, when she conveyed to him the one hundred and sixty acres at Mount Scott, but it is doubtful whether this was a sale to satisfy a prior obligation, for the plaintiff says "she might have given it to me; yes." He says, however, she owed him for work on the place and looking after the farm, but when asked how much she owed him, he was unable to say, and stated further that neither one was very particular, or kept things very close, as it pertained to business matters between them. On July 2 following she conveyed to him a tract of sixty acres adjoining her land south of the railroad on the east, upon which plaintiff and wife have been making their home. This he redeeded to her, and she at once conveyed the same to his wife, with twelve acres added. This was a gift outright, without other consideration to support the transfer. Now, again, on January 21, 1891, Mrs. Smith conveyed to plaintiff eighty-two acres of land, being the tract lying in the bottom,—scarcely two years prior to the alleged settlement. This was first intended for his son, but, he not being of age, plaintiff prevailed upon her to

deed it to him, so that he might be able to use it. He has subsequently disposed of it, together with a smaller tract adjoining, in payment of his indebtedness, amounting to over \$1,600; thus indicating that the land was of considerable value at the time it was deeded to him. Now, if Mrs. Smith was indebted to plaintiff at that time in the large sum claimed, it is highly improbable that she would be giving to him or his son this valuable tract of land, and at the same time leaving prior matters of business between them unsettled. The transaction comports very naturally with plaintiff's statement of their manner of doing business,—that neither of them was “particular at all.”

Two years later comes the alleged settlement, whereby it is stated that she agreed to deed plaintiff the fifty-acre tract in question in settlement of a prior indebtedness. There was an arrangement between them whereby he was to have the use of the meadow. This is highly probable from the fact that Mrs. Smith reserved the land south of the railroad from the lease to Thomas, and that plaintiff leased to Thomas his land in the bottom for the same length of time at a nominal rental. But whatever possession plaintiff obtained of the meadow at that time was subsequently, about October 1, 1893, surrendered to Thomas, who has had possession ever since, exercising possessory acts, open and notorious, without protest from the plaintiff. There was never any segregation of the fifty-acre tract, and possession taken of it by the plaintiff. This could not very well have been the case, as the survey was not made until more than three years later, and he does not claim to have entered into exclusive possession of the remaining lands south of the railroad. There was some talk of an exchange of lands between Mrs. Smith and plaintiff, and there is a controversy whether the exchange involved the fifty-acre tract or the eighty-six acres lying between it and the railroad. But, be this as it may, it is fairly shown that the plaintiff's first claim, as it respects the letter directing a survey of the land in question, was not compatible with the idea of an agreement by Mrs. Smith to deed it to him in payment of a former obligation arising from a settlement. Plaintiff went to Mr. Milton Smith,

the attorney for Mrs. Smith, shortly after her decease, with the letter; and Smith says he claimed then that Mrs. Smith had agreed to exchange this land for his land in the bottom. Plaintiff denies that such was the conversation, which he says alluded to an exchange of the eighty-six-acre tract, but he nowhere states that he, in his interview with Smith, claimed his right to a deed was based upon the agreement which he seeks to have specifically performed. The institution of his suit was probably the first definite claim that he made upon the theory of a verbal agreement to convey. It seems that Mrs. Smith talked of deeding plaintiff the meadow long prior to the alleged accounting, and this in acknowledgment of plaintiff's services rendered her, plaintiff says, for ten or fifteen years. Plaintiff built some fencing inclosing a part of the land in dispute, and cut some brush thereon, as far back as 1887, and the deed was then talked of; but it was not until 1893 that the alleged agreement was entered into. The next step was three years later, when the survey was directed, and it was yet three years later when the attempt was made to enforce it. It had been ten years since the larger portion of the alleged indebtedness had accrued, namely, the items of \$3,840 for services of himself and wife and the sale of the horses and mules, when the alleged accounting was had. This illustrates the character of the dealings between the aunt and nephew. Mrs. Smith had been liberal in helping the plaintiff all along, and had been grateful to him for such services as he had rendered her in the management and conduct of the farm while in the possession of lessees and otherwise, and she intended, doubtless, as her letter of May 7, directing the survey, proves, to deed him this land in dispute; but it was manifestly to be in the way she had formerly deeded him lands,—as a gift; possibly as an exchange,—and not for any adequate former services that he had rendered her, nor to discharge any prior legal obligation. Their dealings with each other and plaintiff's admissions repel most persuasively the idea that there was ever any such an accounting that any definite sum was fixed as the amount that Mrs. Smith owed the plaintiff. They “jumped at the

amount," which is not so much as named or stated, and she agreed to make the deed. This was not more than had been talked of since long prior to the alleged agreement and up to the date of Mrs. Smith's death, and it cannot serve to support the alleged agreement to make the deed, saying nothing of possession and other matters of part performance, necessary to take the case out of the statute of frauds. The decree of the court below will therefore be affirmed. **AFFIRMED.**

Decided 9 September, 1901.

LEIGH v. JENNINGS.

From Douglas: JAMES W. HAMILTON, Judge.

Action of ejectment by Edw. B. Leigh, G. G. Warner, and Henry D. Laughlin against P. J. Jennings, Chas. Bruneau, and R. J. Jennings, to recover possession of a mining claim. From a judgment for defendants, this appeal was taken.

DISMISSED.

Messrs. Dolph, Mallory, Simon & Gearin, F. W. Benson, and Coshaw & Sheridan, for appellants.

Messrs. A. C. Woodcock, J. S. Medley, David Goodsell, and Andrew M. Crawford, for respondents.

Pursuant to the stipulation of the parties to that effect, the appeal was dismissed. No opinion. **DISMISSED.**

Decided 24 October, 1901.

LAUGHLIN v. JENNINGS.

Douglas County: JAMES W. HAMILTON, Judge.

Suit by Henry D. Laughlin against P. J. Jennings to quiet his title to the south six hundred feet of the Heavenward Mining Claim, in the Bohemia mining district, resulting in a decree as prayed for, from which defendant appeals.

DISMISSED.

Messrs. Andrew M. Crawford, J. S. Medley and A. C. Woodcock, for appellant.

Messrs. Walton & Markley, and Coshow & Sheridan, for respondents.

Pursuant to the written stipulation of the parties the appeal herein was dismissed without costs or disbursements to either party. No opinion. DISMISSED.

Decided 3 February, 1902.

MONTGOMERY v. JONES.

From Multnomah: JOHN B. CLELAND, Judge.

Suit by B. Montgomery against B. F. Jones to enforce a note and mortgage, resulting in a decree for plaintiff, from which this appeal is taken. DISMISSED.

Messrs. Williams, Wood & Linthicum, for appellant.

Messrs. W. S. Ward and W. M. Gregory, for respondent.

Pursuant to the stipulation of the parties the decree was affirmed without costs or disbursements to either party.

DISMISSED.

Decided 22 October, 1901.

EX PARTE SCOTT.

From Multnomah: ARTHUR L. FRAZER, Judge.

This was a *habeas corpus* proceeding brought by Minna J. Burgoyne to determine the custody of a child, John M. Scott, son of petitioner and one W. K. Scott. After the writ had been served the boy was taken beyond the limits of the state, and subsequent proceedings were had without his presence, resulting in a dismissal of the petition. DISMISSED.

Mr. Cicero M. Idleman, for appellant.

Messrs. Carey & Mays, for respondent.

On motion of appellant the appeal was dismissed. There was no written opinion. DISMISSED.

Decided 9 September, 1901.

WARNER v. BRUNEAU.

From Douglas: JAMES W. HAMILTON, Judge.

Suit by G. G. Warner, Edw. B. Leigh, and Henry D. Laughlin against Chas. Bruneau, P. J. Jennings, and R. J. Jennings to enjoin defendants from trespassing on the Badger mining claim during the pendency of an action of ejectment pending between the same parties. A preliminary injunction was granted, but after the ejectment action had been decided in favor of defendants the suit was dismissed, whereupon plaintiffs appealed. DISMISSED.

Messrs. Dolph, Mallory, Simon & Gearin, F. W. Benson, and Coshow & Sheridan, for appellants.

Messrs. A. C. Woodcock, David Goodsell, John S. Medley, and Andrew M. Crawford, for respondents.

The parties having stipulated for a dismissal of the appeal it was so ordered. No opinion. DISMISSED.

Decided 20 October, 1901.

CLEMENSON v. GUARANTY LOAN ASSOCIATION.

From Multnomah: ARTHUR L. FRAZER, Judge.

Action by J. A. Clemenson to recover from the Guaranty Savings and Loan Association sundry sums paid it in connection with a loan. A demurrer to the complaint having been overruled, judgment went for plaintiff by default, and defendant appealed. DISMISSED.

Messrs. Guy G. Willis and Seneca Smith, for appellant.

Messrs. A. W. Johnson and Joseph & Schlegel, for respondent.

Pursuant to the written stipulation of the parties the appeal was dismissed without any allowance of costs or disbursements to either party. DISMISSED.

Decided 25 November, 1901.

NORTHWEST DOOR CO. v. ROBERTS.

From Marion: REUBEN P. BOISE, Judge.

ON MOTION TO DISMISS THE APPEAL.

Messrs. W. T. Slater and Wm. Kaiser for the motion.

Mr. C. J. Schnabel, contra.

MR. CHIEF JUSTICE WOLVERTON delivered the opinion.

This is a motion to dismiss the appeal. The facts attending the appeal are identical, in effect, with those set forth in the case of *Fisher v. Tomlinson*, 40 Or. 111, just decided; hence the motion must be overruled. MOTION OVERRULED.

ON THE MERITS.

Mr. Henry St. Rayner, for appellant.

Messrs. E. P. Morcom, W. M. Kaiser, and W. T. Slater, for respondents.

MR. JUSTICE MOORE delivered the opinion.

This is a suit to foreclose an alleged mechanics' lien. The facts are, that on December 8, 1898, the plaintiff, a corporation, upon the order of one W. T. Roberts, furnished him certain sash, doors, mouldings, etc., of the value of \$104.20, which the latter delivered to the defendant Tomlinson in pursuance of an agreement whereby it was stipulated that, in consideration of \$300, he would furnish the necessary material to complete the front of the first story of a brick building situated on lot four in block one, in Woodburn, Oregon. At the time this material was ordered Roberts, who was engaged as a retail dealer in such goods, wares, and merchandise in Woodburn, was indebted to the plaintiff in the sum of \$86.61, and, having secured from Tomlinson the sum of \$100 on account of their contract, he, without any direction as to how the money should be applied, paid it to the plaintiff, whereupon the prior bill was settled and the sum of \$13.39 credited on account of the material in question, leaving a remainder of \$90.81 due on ac-

count thereof, to secure the payment of which a claim of lien therefor was duly filed in the office of the clerk of Marion County, and this suit instituted to foreclose the same. The allegations of the complaint, answer, and reply are the same as in the case of *Fisher v. Tomlinson*, 40 Or. 111, except in the particulars hereinbefore stated. A trial being had the suit was dismissed, and the plaintiff appeals.

An examination of the testimony convinces us that there was not such a privity between Roberts and the owners of said building as to make him their agent, statutory or otherwise, and for the reasons set forth in the case of *Fisher v. Tomlinson*, just decided, the decree is affirmed. **AFFIRMED.**

Decided 6 January, 1902.

MORO MERCANTILE CO. v. YAMAOKA.

From Multnomah: ARTHUR L. FRAZER, Judge.

This is an action brought to recover the sum of \$663.17, the value of certain goods sold and delivered and moneys loaned. There was no question as to the amount or value of the goods sold and delivered or money loaned, the defendant's attorney having expressly admitted the same to be as claimed by plaintiff. The sole issue to be tried is as to whether the defendant S. Yamaoka was liable for the same. As a matter of fact, the goods were purchased by and the money loaned to one R. Umino, as he now claims, but who represented himself to the plaintiff as S. Yamaoka, and bought the goods and obtained the money under that name, all of which were charged by the plaintiff to S. Yamaoka. The court directed a verdict for plaintiff. **DISMISSED.**

Mr. J. R. Cunnynggham, for appellant.

Messrs. Mitchell & Tanner, for respondent.

The trial fee not having been paid when the case was called for trial, and no one appearing on behalf of appellant, the appeal was dismissed. **DISMISSED.**

Apr. 1902.]

KRAUSE *v.* MUELLER.

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Decided 6 January ; rehearing denied 10 May, 1902.

STITT *v.* POLICE BOARD.
MURRAY *v.* POLICE BOARD.
WALLER *v.* POLICE BOARD.

Appeal from Multnomah County.

These cases, brought by W. O. Stitt, Patrick Murray, and Mose Waller, respectively, are companion cases to *Venable v. Police Commissioners*, 40 Or. 458 (67 Pac. 203), and were decided on the authority of that case, briefs and arguments being waived.

REVERSED.

Argued 28 January ; decided 17 February, 1902.

HINDMAN *v.* HINDMAN.

[67 Pac. 1134.]

From Linn: REUBEN P. BOISE, Judge.

Mr. J. K. Weatherford, for appellant.

Messrs. J. N. Duncan and *W. R. Bilyeu*, for respondent.

PER CURIAM. This is a suit by Fannie E. Hindman against S. M. W. Hindman for a divorce on the ground of cruel and inhuman treatment. No questions of law are involved in the case. An examination of the record has satisfied us that the decree in favor of plaintiff should be affirmed, and it is so ordered.

AFFIRMED.

Decided 7 April, 1902.

KRAUSE *v.* MUELLER.

From Clackamas: THOS. A. McBRIDE, Judge.

Suit by Frank and Kate Krause against Antone, Theresia and John Mueller to remove a cloud from the title to real property, resulting in a decree for plaintiffs, from which this appeal is taken.

DISMISSED.

Messrs. Adolph Schultz, H. B. Nicholas and *Newton McCoy*, for Antone and Theresia Mueller.

Messrs. Edw. & A. R. Mendenhall, for John Mueller.

Messrs. Snow & McCamant, for Frank and Kate Krause.

The appeal herein was dismissed for failure to perfect it in time and for failure to file the abstract of record required by the rules of court. DISMISSED.

Argued 27 March ; decided 21 April, 1902 ; rehearing denied.

PACIFIC BUILDING CO. v. SPURRIER.

[68 Pac. 1135.]

From Multnomah: JOHN B. CLELAND, Judge.

Messrs G. W. Allen and G. W. Baker, for respondent.

Messrs. Dell Stuart, Wm. Reed, and R. Stott, for appellants.

PER CURIAM. This is a suit to foreclose a mortgage executed and delivered by Augusta M. Spurrier and husband to the plaintiff, a California building and loan corporation, to secure a loan. In a suit by the same plaintiff against Hill, reported in 40 Or. 280 (67 Pac. 103), it was held that the contract which was on all fours with that sought to be enforced in this suit, was usurious under the laws of this state, and, within the doctrine of the Stanley and Houston cases (38 Or. 319 and 377), all payments made thereon should go in extinguishment of the loan.

This conclusion is decisive of this case, and the decree of the court below will therefore be reversed, and one entered here accordingly. REVERSED.

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ACTION.

WHAT AMOUNTS TO COMMENCING AN ACTION.

1. Hill's Ann. Laws, § 14, declares that an action shall be deemed commenced when the complaint is filed and summons served; and section 15 enacts that an attempt to commence an action by delivery of summons with intent that it be served, shall be in effect a commencement. *Held*, that wherein a suit against a corporation and its stockholders and creditors, no summons was served on the corporation until after the filing of a supplemental petition, but the journal entry showed that immediately on the filing of the original complaint "defendant" appeared by "its" attorney, and such attorney was shown to have been in fact the attorney for the corporation, and that he represented them in the proceedings, the suit was commenced at the time of the appearance.

Dunne v. Portland St. Ry. Co. 295.

ACTIONS AGAINST PUBLIC CORPORATIONS.

2. Hill's Ann. Laws, § 350, providing that an action may be maintained against any public corporation in this state, in its corporate character, and within the scope of its authority, for an injury to plaintiff from some act or omission of such public corporation, authorizes an action against a city only when it is liable in its corporate capacity, as distinguished from its political or governmental capacity.

Wagner v. Portland, 389.

ACT OF GOD.

Electric Company—Unusual Storm—Fallen Wire. See ELECTRICITY, 5.

ACTS OF LEGISLATURE. See CONST. LAW AND STATUTES.

ADMINISTRATION of Estates. Same as EXECUTORS AND ADMINISTRATORS.

ADMISSIONS Against Interest. See EVIDENCE, 11.

ADVANCING CASES FOR ARGUMENT. See RULES OF COURT, 1.

ADVERSE PARTIES.

Serving Notice of Appeal—Act of 1899. See APPEAL, 1.

ADVERSE POSSESSION.

ADVERSE HOLDING OF WHARF RIGHT.

1. A wharf right may be lost by prescription just as land may be, and the same rules apply as in cases of adverse claims to land. *Montgomery v. Shaver*, 244.

REQUIREMENT OF CLAIM BY PRESCRIPTION.

2. A person claiming title by prescription to the water front appurtenant to the land of a riparian owner must show an ouster and an actual possession under a claim of right for the statutory period. *Montgomery v. Shaver*, 244.

EVIDENCE OF ADVERSE POSSESSION OF WHARF RIGHT.

3. A riparian owner claiming title by adverse possession of the water front of an adjoining riparian owner had driven piling for the purpose of constructing a wharf, but it was never completed. He afterwards authorized the use of a portion of the space as a ferry slip, and it was so used for about six months, and boats were occasionally tied up to the piling. *Held*, not to show an exclusive use sufficient to give title by adverse possession. *Montgomery v. Shaver*, 244.

AFFIDAVITS.

Necessary Averments in Contempt Cases—Effect of Verdict on Defective Affidavits. See CONTEMPT, 2.

AFFIRMANCE

Of Judgment as Result of Imperfect Record. See APPEAL, 9, 10.

AGENTS AND AGENCY. Same as PRINCIPAL AND AGENT.

AIDER.

Curative Effect of Answer or Verdict. See PLEADING, 22, 23, 24.

ALIENS.

Alienage is a disability of an applicant for public lands, generally speaking, but naturalization removes the disability as of the date when the acquisition of title was initiated, and the title cannot thereafter be questioned or set aside on that ground, even by the sovereign. *Oregon v. Carlson*, 566.

ALIMONY.

Sufficient Showing for Permanent Allowance. See DIVORCE, 1.

Right of Courts to Modify Allowance. See DIVORCE, 2, 3.

Right of Remarried Wife to Allowance. See DIVORCE, 4.

ALLEGATA ET PROBATA. See PLEADING, 35, 36, 37.

AMBIGUITY.

Parol Evidence to Explain Writing. See EVIDENCE, 3, 4.

AMENDMENT

Of Abstract of Record by Adding Thereto. See RULES OF COURT, 4, 5.

Of Complaint by Changing Title of Case. See PLEADING, 32.

ANSWER.

Effect of on Defective Complaint. See PLEADING, 22, 23, 24.

ANTICIPATING Interest.

Effect of Paying Interest on Note in Advance. See BILLS AND NOTES, 11.

APPEALABLE ORDER. See APPEAL, 12.

APPEAL AND ERROR.

SERVICE OF NOTICE ON PARTIES IN DEFAULT.

1. The amendment of Section 537 of Hill's Ann. Laws, by the act of 1899, regulating the method of taking appeals to the supreme court (Laws, 1899, p. 228), was intended to modify the existing statute by relieving the appellant from the obligation of serving the notice of appeal on adverse parties who have not appeared, and now the notice need be served on only those parties who have appeared.

United States Invest. Corp. v. Portland Hospital, 528.

RIGHT TO ABANDON ONE APPEAL AND PERFECT ANOTHER.

2. A party may abandon an imperfectly attempted appeal and initiate another one, the unsuccessful attempt not being conclusive of his right.

Fisher v. Tomlinson, 111; *Skinner's Will*, 571.

NECESSITY OF PRODUCING SURETIES WHEN EXCEPTED TO.

3. Where exceptions are taken to the sureties on an appeal bond, the appellant is not required to produce the sureties for justification, but may abandon the appeal and take a new one.

Skinner's Will, 571.

PRACTICE AS TO FILING NEW UNDERTAKING IS LIBERAL.

4. Where confusion and irregularity concerning the undertaking on appeal have been caused by the death of appellant and objections to the sureties on the appeal bond, the preferable practice is for the substituted appellant to tender a new undertaking, and it will be accepted in place of the first one.

Skinner's Will, 571.

IDEM.

5. Under Hill's Ann. Laws, § 537, subd. 4, authorizing the court to permit an appellant to perform any omitted act necessary to perfect an appeal where the notice has been given in good faith, the circuit court may allow a new undertaking to be filed where the sureties have not been able to justify on the original, and the time for filing the bond has expired.

Skinner's Will, 571.

BILL OF EXCEPTIONS—STENOGRAPHIC TRANSCRIPT OF PROCEEDINGS.

6. A document which consists of a copy of all the proceedings at a trial, with an order of court approving the copy and directing the clerk to attach it to the bill of exceptions, and which is so attached, is not a part of such bill, for it is not embodied therein, nor was it attached thereto when the bill was signed. An identification of a transcript of the stenographer's notes by the trial judge, with a direction to attach it to the bill of exceptions does not make such transcript a part of the bill.

Nosler v. Coos Bay Nav. Co. 305.

BILL OF EXCEPTIONS—STENOGRAPHER'S MINUTES.

7. Under Section 282, Hill's Ann. Laws, directing that a bill of exceptions shall set out the objections made with only so much matter as may be necessary to explain them, a transcript of all the proceedings during the trial is not a bill of exceptions.

Nosler v. Coos Bay Nav. Co. 305.

WHEN STENOGRAPHER'S NOTES ARE A PART OF THE RECORD.

8. A transcript of the stenographer's minutes of the trial of an action of law is no part of the bill of exceptions.

Nosler v. Coos Bay Nav. Co. 305.

EFFECT OF MOTION TO STRIKE BILL OF EXCEPTIONS.

9. Where an appeal was taken in the manner and within the time prescribed by law, and abstracts and briefs were filed as required by the rules of court, the appeal will not be dismissed, or judgment affirmed, on motion to strike the transcript because of defects in the bill of exceptions, since the jurisdiction of the court and the sufficiency of the complaint can be raised without a bill of exceptions, and a defective bill may be amended.

Nosler v. Coos Bay Nav. Co. 305.

IDEM.

10. Where the effect of granting a motion will be to leave the record in such a

condition that the questions sought to be presented cannot be considered, the motion will be treated as one to affirm, and an order will be entered accordingly.

Nosler v. Coos Bay Nav. Co. 305.

TIME TO FILE TRANSCRIPT AFTER OBJECTIONS TO SURETIES.

11. Section 541 of Hill's Ann. Laws, requiring the transcript on appeal to be filed within thirty days from the expiration of the time allowed to object to the sureties on the undertaking, is complied with by filing the transcript within the required time from the justification of the sureties after being excepted by some of the respondents. An objection by one respondent serves to extend the time of the appellant as to all the respondents.

Skinner's Will, 571.

APPEALABLE ORDER.

12. Where a court intends to finally pass upon all the questions at issue in a pending case, and make a concluding adjudication respecting them, without intending to hold the matter under further consideration, the order thus entered is a "final order," within the meaning of Section 535 of Hill's Ann. Laws, from which an appeal may be taken; thus, an order adjudging a person guilty of contempt and fixing his punishment is a final and appealable order, notwithstanding an additional clause that further proceedings be stayed until the further order of the court, and that defendant have a stated time within which to prepare a bill of exceptions, the effect of this last clause being to stay the enforcement of the order.

State ex rel. v. Downing, 309.

IDENTIFICATION OF EVIDENCE—CERTIFICATE REQUIRED.

13. Where an appeal from the county court to the circuit court is tried in the latter court on testimony given in the former, the evidence is sufficiently identified on appeal to the supreme court by the certificate of the county judge, and does not need the additional certificate of the circuit judge.

Skinner's Will, 571.

AMENDING ABSTRACT BY ASSIGNING ERRORS.

14. Where an appellant, through mistake or inadvertence, has failed to print an assignment of errors in his abstract, as required by Rule 9 of the court (35 Or. 567, 598), he may supply the omission if a proper showing is made.

Skinner's Will, 571; *Wagner v. Portland*, 389.

PARTY ENTITLED TO ALLEGE ERROR.

15. Questions asked a witness who was not shown to be an expert as to the necessity of rules for taking down electric wires, and questions regarding the adoption of rules by other companies doing that class of work, but which were not confined to the specific rules which plaintiff insisted should have been adopted, which questions were objected to by defendant, did not constitute such an effort to show the necessity of such rules as to preclude defendant from insisting on a lack of evidence in this particular.

Wagner v. Portland, 389.

PRESUMPTION OF INJURY FROM ERROR.

16. Where error affirmatively appears, presumably it was injurious, and the contrary must be shown to prevent reversal.

United States v. McCann, 13.

IDEM.

17. Error will not be presumed to have been harmless, but where all the testimony is brought up and it appears therefrom that appellant has not been injured, the judgment should not be reversed for such error.

Brock v. Weiss, 80.

PRESUMPTION OF SUFFICIENCY OF EVIDENCE.

18. Where the record on appeal does not purport to contain all the evidence on a point on which an instruction was given, it will be presumed that the evidence was sufficient to support the instruction.

Bingham v. Lipman, 363.

POWER TO DIRECT A PARTICULAR JUDGMENT.

19. On appeal from a judgment in a law action tried before a judge alone, the supreme court may remand the case with a direction to enter a particular judg-

APPEAL AND ERROR.

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ment, if all the facts have been found; but if no finding has been made on a material point, the case must go back for a new trial.

Pacific Lum. Co. v. Prescott, 374.

PRACTICE IN REVERSING EQUITY DECREE.

20. Where, in a suit to restrain the obstruction by artificial works of the flow of water through a natural depression in the bank of a stream, it is claimed that such works could be maintained with great benefit to defendant, and without injury to plaintiff, during a portion of the season, but the evidence and findings do not show during what times this might be done, the appellate court should not modify an injunction decree so as to permit such works to be maintained at any time, but will leave such matter for the trial court. *Mace v. Mace*, 586.

HARMLESS ERROR—IMMATERIAL FINDINGS.

21. In an action on a note against a corporation, a finding that the president, one of the persons who executed the note, was the owner of the majority of the stock of the corporation, though outside the issues, is not prejudicial to the defendant, where the judgment is supported by proper findings.

Reade v. Pacific Supply Assoc. 60.

HARMLESS ERROR—CUMULATIVE EVIDENCE.

22. Where evidence on a collateral matter has been received without objection, and remains uncontradicted, it is harmless error to subsequently admit cumulative evidence on the same subject.

Brock v. Weiss, 80.

HARMLESS ERROR IN ADMITTING EVIDENCE.

23. Error committed in admitting evidence is rendered harmless by subsequently receiving other unobjectionable evidence covering the same point.

Haines v. Cadwell, 229.

INSTRUCTION—ESTOPPEL TO OBJECT.

24. Where defendant has introduced evidence in support of an attempted counterclaim, which is not at issue because of defective pleading, and plaintiff has given evidence in rebuttal thereof, defendants cannot complain of a charge as to the effect of such evidence if found true.

Haines v. Cadwell, 229.

RULES OF COURT—ADVANCING FOR ARGUMENT.

25. A case involving solely the construction of a will wherein only private persons are interested does not involve any question of "public importance" as that expression is used in Rule 16 of the supreme court, justifying a hearing out of its regular order.

Booth's Will, 154.

Costs on appeals. See COSTS, 5, 8.

APPEARANCE.

EFFECT OF APPEARANCE ON RUNNING OF STATUTE.

1. A voluntary appearance by a defendant is equivalent to the commencement of an action in its effect on the running of the statute of limitations.

Hawkins v. Donnerberg, 97.

COMMENCEMENT OF ACTION—EFFECT OF APPEARANCE.

2. A suit or action is "commenced" so as to stop the running of the statute of limitations when the defendant enters a general appearance, without reference to the issuance of a summons.

Dunne v. Portland St. Ry. Co., 285.

IDEM.

3. Hill's Ann. Laws, § 14, declares that an action shall be deemed commenced when the complaint is filed and summons served; and section 15 enacts that an attempt to commence an action by delivery of summons with intent that it be served shall be in effect a commencement. *Held*, that where, in a suit against an insolvent corporation and stockholders thereof, no summons was served on the corporation until after the filing of a supplemental petition, but the journal entry showed that immediately on the filing of the original complaint "defendant" appeared by "its" attorney, and such attorney was shown to have

been in fact the attorney for the corporation, and that he represented them in the proceedings, the suit was commenced at the time of the appearance.

Dunne v. Portland St. Ry. Co., 295.

ASHLAND CHARTER of 1901. See CHARTERS OF CITIES.

ASSESSMENT.

Tax—Lump Assessment Under Section 2770 is Void. See TAXATION, 1.

Street Improvement—Void Proceedings—Meaning and Effect of Curative Act. See MUNIC. CORP. 17, 18, 19.

ASSIGNMENTS OF ERROR.

Adding Assignments to Abstract. See RULES OF COURT, 4.

ATTACHMENT. See also GARNISHMENT.

PROPERTY IN WAREHOUSE—ASSIGNING RECEIPT.

1. Property stored in a warehouse and represented by a receipt cannot be attached as belonging to the depositor if he has theretofore transferred his receipt.

Adamson v. Frazier, 273.

EFFECT OF WITHDRAWING CLAIM FROM SHERIFF'S JURY.

2. Where property in the hands of an officer is claimed in writing by a stranger to the writ under which it is held, the withdrawal of the claim before the retiring of the sheriff's jury called to try the question of title ends the trial (Hill's Ann. Laws, §§ 286, 288), and proceedings thereafter by such jury are entirely ineffective to constitute an estoppel on the claimant.

Singer Mfg. Co. v. Driver, 332.

IDEM.

3. Where one claimed goods taken under an attachment by an officer, but withdrew his claim before the retiring of the sheriff's jury, and sued the officer for conversion, and it appeared there had been a sale under the attachment, but not whether the action was commenced before the sale, it will be presumed, on a motion by defendant for judgment on the pleadings, that the action of conversion was commenced before the sale.

Singer Mfg. Co. v. Driver, 332.

EFFECT OF ERROR IN RECORDING STATUTORY CERTIFICATE.

4. Under Hill's Ann. Laws, § 151, the lien of an attachment depends on the date of the filing of the certificate, and a clerical mistake of the clerk, in recording it, in substituting the name of one county for another in the title of the cause, will not defeat the lien.

Schlusser v. Beemer, 412.

COLLATERAL ATTACK ON JUDGMENT RECORD.

5. Where in proceedings in which land was attached, the question was presented to the court by motion that the returns of the officers on the writs of attachment were insufficient, the determination thereon cannot be questioned collaterally in an action between the attachment debtor and a purchaser under an execution issued on a judgment secured in the attachment proceedings.

Schlusser v. Beemer, 412.

ATTESTATION OF WILL. See WILLS, 8, 9, 10.

ATTORNEY AND CLIENT.

NATURE OF CLAIM OF ATTORNEY FOR AN ESTATE.

The claim of an attorney against an administrator for services rendered to an estate is a claim against both the administrator and the estate, and it is not affected in any way by the failure of the administrator to perform his trust duty.

Mills' Estate, 424.

BANKS AND BANKING.

ADVANCES ON SECURITY NOTE.

1. Defendants executed a note to plaintiff, a banker, to secure a present payment and future advances if he should choose to make any. After he had refused to

make further advances, defendants deposited certain drafts, which were credited to their account. When one of the drafts was paid, a clerk credited the amount to them, not knowing that it was credited before. On discovering the mistake, plaintiff charged the amount back to defendants, but they checked against the amount so credited, and plaintiff honored the checks. *Held*, in an action on such note, that the amount so paid on such checks should be considered as advanced under such agreement. *Haines v. Cadwell*, 229.

BUILDING AND LOAN COMPANIES NOT BANKING CORPORATIONS.

2. A foreign corporation making loans upon security of real estate and pledges of its own stock is not a "banking corporation," within Hill's Ann. Laws, §§ 3276, 3277, requiring such a corporation to record a power of attorney in each county where it has a resident agent. *Pacific Building Co. v. Hill*, 280.

BANKS OF STREAMS.

Right to Enlarge Natural Depressions. See WATERS, 1.

BILL OF EXCEPTIONS.

Making Stenographic Notes Part of the Bill. See APPEAL, 6, 7, 8.

BILL OF RIGHTS, Art. I, §§ 26, 33.

Ladd v. Holmes, 182, 183.

BILL OF PEACE.

Necessary Allegations of Pleadings. See QUIETING TITLE, 2, 6, 8.

Proofs Under Suits to Remove Clouds From Titles or to Determine Adverse Interests in Land. See QUIETING TITLE, 2, 4.

General Nature of Statutory Remedy. See QUIETING TITLE, 5, 7.

BILLS AND NOTES. See, also, INTEREST.

ACTIONS—DEFECTIVE PLEADINGS—WAIVER BY ANSWERING OVER.

1. The defect in the complaint in an action on a note in alleging only the conclusion that a certain sum is due, instead of stating when the note matured, is waived by answering over. *Creecy v. Joy*, 28.

ACTIONS—IMMATERIAL VARIANCE BETWEEN PLEADINGS AND PROOFS.

2. There is not a material variance between an allegation of the execution of a joint and several note by certain named persons and proof of the execution of a joint note by said parties and that one of the parties is dead. *Creecy v. Joy*, 28.

IDEM.

3. Where in an action on a note an indorsement was alleged to have been made, and the note delivered, November 20, it was competent to prove that the note was actually delivered, indorsed in blank, in the previous August, and that on November 20 an indorsement of a waiver of demand and notice of protest was made on the note. *Delsman v. Friedlander*, 33.

ACTION ON JOINT NOTE—LIABILITY OF SURVIVOR.

4. An action can be maintained against the survivor of the makers of a joint promissory note without joining the representatives of the deceased maker. *Creecy v. Joy*, 28.

ACTION—INCONSISTENT DEFENSES—EFFECT OF EXTENDING NOTE.

5. A denial in the answer in an action on a note that there is any sum due on the note from defendants is not so inconsistent with an affirmative defense that the defendants are merely sureties, and have been relieved from liability by an unauthorized extension of time by the principal, as to authorize the court to strike out the affirmative defense, as such denial is compatible with the affirmative defense, because the alleged extension of time would discharge the defendants from all liability. *Randall v. Simmons*, 554.

CONTRACT OF INDORSEMENT.

6. An indorsement by the payee of a promissory note of the words, "I hereby guaranty payment of the within, and waive demand, notice of protest, and protest," on the back thereof is a contract of indorsement and not of guaranty.

Delsman v. Friedlander, 33.

WAIVING PROTEST—NEED OF CONSIDERATION.

7. Where on the day when a note was due the indorsers thereof signed a provision on the back of the note waiving demand, notice of protest, and protest, no consideration was necessary to uphold such waiver. *Delsman v. Friedlander, 33.*

EFFECT OF GUARANTY—NEED TO DEMAND PAYMENT OF MAKER.

8. A guaranty of payment is an absolute promise to pay the guaranteed obligation when due, no demand or notice is necessary to hold the guarantor, and mere passiveness on the part of the holder will not release the guarantor.

Delsman v. Friedlander, 33.

EFFECT OF PROMISING HIGHER INTEREST AFTER DEFAULT.

9. A provision in a promissory note that if it shall not be paid at maturity it shall thereafter bear a specified higher rate of interest than before maturity (such higher agreed rate being less than the highest legal rate) is an agreement for liquidated damages, which the parties are at liberty to make if they choose.

Close v. Riddle, 592.

PARTNERSHIP NOTE—DISSOLUTION—EFFECT OF ASSUMING DEBTS.

10. Where a creditor of a partnership, holding a note jointly executed by the partners, has notice that one partner has assumed the firm debts, thus creating the relation of principal and surety between the partners, an extension of the time of payment to the partner assuming the debt, without the consent of the other partner thereto, operates to discharge the latter from all liability.

Lazelle v. Miller, 549.

EFFECT OF ACCEPTING INTEREST IN ADVANCE.

11. The acceptance of interest on a note in advance by a creditor from his principal debtor is an extension of the time of payment, and will release the surety, if made without his consent.

Lazelle v. Miller, 549; Randall v. Simmons, 554.

BLASTING.

Necessity For Rules in Quarry. See MASTER AND SERVANT, 13.

BOND Of Public Officer.

Nature of Acts For which Sureties Are Liable. See OFFICERS, 4.

BONA FIDE PURCHASERS. See FRAUDULENT CONVEYANCE.**BOUNDARIES.****DESCRIPTIONS—COURSES—MONUMENTS.**

It is a general rule that monuments control courses and distances in construing descriptions of land, but this must yield to the superior rule that the entire instrument must be considered with its surrounding circumstances and upheld if reasonably possible.

Baker County v. Benson, 207.

BRIEFS.

Excusing Delay in Filing—Sickness. See RULES OF COURT, 3.

Expense of Unnecessary Matter In. See COSTS, 7.

BUILDING AND LOAN ASSOCIATIONS.**BUILDING AND LOAN COMPANIES NOT BANKING CORPORATIONS.**

1. A foreign corporation making loans upon security of real estate and pledges of its own stock is not a "banking corporation," within Hill's Ann. Laws, §§ 3276, 3277, requiring such a corporation to record a power of attorney in each county where it has a resident agent.

Pacific Building Co. v. Hill, 280.

USURIOUS CONTRACT.

2. A contract by a borrower from a loan company under which he purchases a stated amount of stock in the company, at once assigns half of his purchase to the company absolutely, as a premium for the loan, and then pays the monthly assessments on his entire subscription, together with six per cent interest on the amount borrowed, is usurious, since the interest and monthly assessments combined amount to more than ten per cent on the loan, and no higher rate than ten per cent can be directly or indirectly paid for the use of money in this state. A company doing a loan business on that plan is not a legitimate building and loan association, and all payments made by the borrower should go to the extinguishment of the loan with the interest that may have accumulated thereon at the agreed rate.

Pacific Building Co. v. Hill, 280.

INTERPRETATION OF CONTRACT—PLACE OF PERFORMANCE.

3. Where a citizen of Oregon and a foreign building and loan association doing business in Oregon, made a contract in Oregon, to be executed by payment of money in California, such contract being usurious by the laws of Oregon, but not so by the laws of California, it will not be enforced by the courts of Oregon, the principle of interstate comity not requiring the enforcement of contracts contravening public policy or violating law. Particularly is this true where the surrounding circumstances justify the conclusion that the contract was drawn with the intention of evading the Oregon laws and court decisions.

Pacific Building Co. v. Hill, 280.

CONTRACTS OF FOREIGN CORPORATIONS—WHAT LAW GOVERNS.

4. A contract between a resident citizen of Oregon and a foreign corporation having a local agent in this state, concerning Oregon land, is an Oregon contract, and should be construed according to the laws and court decisions here, though the principal and interest are in terms payable at the home office of the corporation, and it has for the convenience of its patrons sent to such local agent for collection the receipts for the amounts due under the contract, and though the contract contained a distinct agreement that it should be construed in accordance with the laws of the home state of corporation.

Hicinbotham v. Interstate Loan Assoc. 511.

BURDEN OF PROOF.

Admitted Allegations Need not be Proved. See EVIDENCE, 15.

Where Loss Appears in Value of an Estate. See EXS. AND ADMRS. 11.

CALENDARS.

Advancing Cause for Argument. See RULES OF COURT, 1.

CASES FROM THE OREGON REPORTS Applied, Approved, Cited, Criticised, Distinguished, Followed, and Overruled in This Volume.

Same as OREGON CASES.

CENSUS.

Judicial Notice of Time of Taking. See EVIDENCE, 7.

CERTIFICATE.

Identification in Supreme Court of Evidence in Case Commenced in County Court. See APPEAL, 13.

CERTIORARI. Same as WRIT OF REVIEW.**CHARGING JURY.**

Need of Giving Duplicate Instructions. See TRIAL, 6.

Manner of Presenting Respective Theories. See TRIAL, 9.

Covering Matters Not in Issue. See TRIAL, 7.

Special Instructions Should be Requested. See TRIAL, 10.

CHARTERS OF CITIES.

- Ashland, 1901, Sec. 8, Houck, v. Ashland, 117.
- Portland, 1898, { Sec. 68, Venable v. Police Commissioners, 458.
 Sec. 69, Venable v. Police Commissioners, 458.
 Sec. 70, Venable v. Police Commissioners, 458.
 Sec. 87, Wagner v. Portland, 387.
 Sec. 99, Venable v. Police Commissioners, 458.
 Sec. 101, Venable v. Police Commissioners, 458.
 Sec. 156, { Thomas, v. Portland, 50.
 Oregon Real Estate Company v. Portland, 56.
- Salem, 1899, Sec. 6, Salem v. Anson, 339.

CITATION to Administrator, Need of. See EX. AND ADMR. 12.

CITIES. Same as MUNICIPAL CORPORATIONS.

CITY CHARTERS. Same as CHARTERS OF CITIES.

CITY ORDINANCES. Same as ORDINANCES OF CITIES.

CLAIM AND DELIVERY. Same as REPLEVIN.

CLASS LEGISLATION.

Primary Election Law as Granting Special Privileges. See CONST. LAW, 8.

CLERKS OF COURTS.

COUNTY CLERKS—RIGHT TO CHARGE FOR SERVICES.

1. Under a statute providing a salary for a county clerk, to be exclusive of all other charges and compensation, except for furnishing copies to private parties, a county is a "private party" as to the clerk of another county, and the clerk may properly charge the other county for copies of his records, even if required by a subsequent law to furnish them, though, generally, counties, being instrumentalities of government, are not liable for the services of public officials.

Baker County v. Benson, 207.

COUNTY CLERKS—RIGHT TO PREPAYMENT OF FEES.

2. A county clerk who is obligated to do certain work for a public corporation, and is entitled to charge therefor, cannot insist on having his fees in advance.

Baker County v. Benson, 207.

CLOUD ON TITLE.

Void Assessment—Tendering Tax or Penalty. See TAXATION, 2, 3.

Void Tax-Sale Certificate as Cloud on a Title. See QUIETING TITLE, 1, 5.

Nature of Suit to Remove a Cloud. See QUIETING TITLE, 6, 7.

CODE CITATIONS. Same as STATUTES OF OREGON.

COLLATERAL ATTACK.

See JUDGMENTS, 3, 4, 5.

See CONSTITUTIONAL LAW, 1.

COMMENCEMENT OF ACTION. See LIMITATION OF ACTIONS.

COMPLAINT. See PLEADING, 5-14.

CONFLICT OF LAWS.

CONTRACTS OF FOREIGN CORPORATIONS—WHAT LAW GOVERNS.

1. A contract between a resident citizen of Oregon and a foreign corporation having a local agent in this state, concerning Oregon land, is an Oregon contract, and should be construed according to the laws and court decisions here, though the principal and interest are in terms payable at the home office of the corporation, and the contract contained a distinct agreement that it should be construed in accordance with the laws of the home state of the corporation.

Hicinbotham v. Interstate Loan Assoc. 511.

INTERPRETATION OF CONTRACT—PLACE OF PERFORMANCE.

2. The general rule that a contract for the payment of money, entered into *bona fide* in one state, and made payable in another, will be construed and enforced according to the laws of the state where payable, is subject to the qualification that no state is bound to enforce in its courts any contract that is injurious to its public rights, or offends its morals, or contravenes its public policy.

Pacific Building Co. v. Hill, 280.

CONSPIRACY.

Stating The Facts in Actions Based On. See PLEADING, 5, 6.

Showing Acts of Agents of Defendants. See EVIDENCE, 9.

CONSTITUTIONAL LAW.

COLLATERAL PROCEEDING.

1. It is a general rule that in a collateral proceeding the constitutionality of a statute will not be considered, but the court will assume that the act is valid.

Baker County v. Benson, 207.

LIMIT OF LEGISLATIVE POWER.

2. No legislature can declare valid an act which has been declared invalid by a court of competent jurisdiction, for no independent department of government may interfere with the powers of a co-ordinate branch. *Thomas v. Portland*, 50.

SUBMISSION TO POPULAR VOTE.

3. The expression in the Const. Or. Art. I, § 21, that no law shall be passed, the taking effect of which shall be made to depend on any authority, except as provided by the constitution, "provided local and special laws may take effect or not, upon a vote of the electors interested," is neither a grant nor a limitation of power, but merely a qualification on the preceding clause, and does not make it obligatory on the legislature to submit to the interested electors the question whether certain territory in one county should be separated therefrom and annexed to another, and a special act providing for such annexation is not unconstitutional because it is not conditioned on popular approval through the ballot.

Baker County v. Benson, 207.

ELECTION AUTHORIZED BY LAW.

4. A law such as Laws, 1901, p. 317, requiring the holding of primary elections for the selection of delegates to nominating conventions under the supervision of public officers at public expense, provides for an election "authorized by law and not provided for by the constitution," within the meaning of Const. Or. Art. II, § 2, prescribing the qualifications of electors in all such elections. *Ladd v. Holmes*, 167.

RIGHTS OF ELECTORS TO VOTE.

5. Laws, 1901, p. 317, providing a method of holding primary elections, is not in conflict with Const. Or. Art. II, § 2, providing that qualified electors "shall be entitled to vote at all elections authorized by law;" for the right to vote is dependent upon the residence of the elector and the nature of the election.

Ladd v. Holmes, 167.

FREE AND EQUAL ELECTIONS.

6. The meaning of the word "free" in the Constitution of Oregon, Art. II, § 1, providing that "all elections shall be free and equal," is that the voter shall not be hindered or prevented from free participation in the election; and the word "equal" in the same section means the right of every qualified elector to have his vote counted as cast, and to have the votes of only qualified persons counted, to the end that his vote may exercise its just effect in proportion to the number of votes cast by qualified persons.

Ladd v. Holmes, 167.

IDEM.

7. The Lockwood Primary Act (Laws, 1901, p. 317), providing a method of holding primary elections for the selection of delegates to nominating conventions, is not in conflict with Const. Or. Art. II, § 1, guarantying that elections shall be "free and equal."

Ladd v. Holmes, 167.

EQUAL PRIVILEGES AND IMMUNITIES.
8. An election law such as Laws, 1901, p. 817, providing a method of holding primary elections for the selection of delegates to nominating conventions, is not in conflict with Const. Or. Art I, § 20, since the act is but a reasonable regulation of the larger parties, designed to safeguard the privileges of the electors thereof, and is not an infringement of the rights of minor parties. *Ladd v. Holmes*, 167.

RIGHT OF PEOPLE TO PEACEABLY ASSEMBLE.
9. An election law such as Laws, 1901, p. 317, requiring the holding of primary elections under the supervision of the general election officers, prescribing a test for the indication of party affiliations, and directing the manner of electing committeemen, fixing their terms of office, and specifying their duties, is not an unwarrantable invasion of the rights of political parties, nor an infringement of the rights guarantied by Const. Or. Art. I, §§ 26, 33, securing the right of the people to peaceably assemble to consult for their common good, and prohibiting the impairing of the rights and privileges retained by the people. *Ladd v. Holmes*, 167.

DUE PROCESS OF LAW.
10. An act providing that after an assessment for a public improvement has been adjudged void the municipality may maintain an action against the owners of the property assessed, is not a taking of property without due process of law, for the parties affected are allowed a day and time to be heard on the right and manner of assessment. *Thomas v. Portland*, 50.

RIGHT TO VERDICT OF JURY IN NEGLIGENCE CASES.
11. Under the Constitution of Oregon, Art. I, § 17, providing that the right of trial by jury in all civil cases shall remain inviolate, the question of negligence must be left to the jury to determine, where the defendant has been put upon the defense, even though there may not be any conflict in the testimony. *Shobert v. May*, 68.

See COUNTIES, ELECTIONS, PUBLIC LANDS, STATUTES.

CONSTITUTION OF OREGON.

Article I,	Sec. 17,	{ Reade v. Pacific Supply Assoc. 65.
	Sec. 18,	{ Shobert v. May, 68, 73.
	Sec. 20,	Baker County v. Benson, 207, 214, 216.
	Sec. 21,	Ladd v. Holmes, 168, 178, 180.
	Sec. 26,	Baker County v. Benson, 208, 211, 219.
	Sec. 31,	Ladd v. Holmes, 168.
Article II,	Sec. 33,	Oregon v. Carlson, 566, 567, 570.
	Sec. 1,	Ladd v. Holmes, 168.
	Sec. 2,	Ladd v. Holmes, 167, 178.
	Sec. 3,	Ladd v. Holmes, 167, 178, 179.
Article IV,	Sec. 5,	Baker County v. Benson, 208, 222.
	Sec. 6,	Baker County v. Benson, 208, 222.
	Sec. 7,	Baker County v. Benson, 208, 222.
	Sec. 20,	Baker County v. Benson, 208, 222.
	Sec. 28, Subd. 13,	Ladd v. Holmes, 168.
Article VII,	Sec. 12,	{ Herren's Estate, 95.
		{ Rutenic v. Hamakar, 451.
Article IX,	Sec. 20,	Ladd v. Holmes, 180.
Article XI,	Sec. 3,	Hawkins v. Donnerberg, 103.
Article XIV,	Sec. 1,	Baker County v. Benson, 221.
	Sec. 3,	Baker County v. Benson, 221.
Article XV,	Sec. 6,	Baker County v. Benson, 222.

CONSTITUTION OF THE UNITED STATES.

Fifth Amendment, *Thomas v. Portland*, 55 (in footnote).

CONSTRUCTIVE FRAUD. See FRAUDULENT CONVEYANCES, 5.

CONTEMPT.

TITLE OF CIVIL CONTEMPT CASE—AMENDING TITLE.

1. Under Section 655 of Hill's Ann. Laws, a contempt proceeding in a case not of public interest should be conducted in the name of the state on the relation of the party interested, and where such a proceeding has not been so entitled, it is discretionary with the trial court, under Section 101 of Hill's Ann. Laws, to allow an amendment before trial changing the title by substituting the State *ex rel.* as plaintiff. *State ex rel. v. Downing, 309.*

CONTEMPT—CONTENTS OF AFFIDAVIT—AIDER BY ANSWER.

2. An affidavit filed as the basis of a proceeding for a contempt not committed in the presence of the court should show the facts constituting the contempt, that the order that has been disobeyed had been served on the defendant or that he had personal knowledge or notice of it, and that a demand to comply with such order had been made by some person authorized to require such compliance; but the want of some of or all these allegations may be supplied by the answer, in which case the defect is cured. *State ex rel. v. Downing, 309.*

JUDGMENT OF CONTEMPT—NECESSITY OF WARRANT.

3. A judgment of contempt is not self-executing under the statutes of Oregon, but must be enforced by means of a warrant of commitment, which is to issue at the order of the court. *State ex rel. v. Downing, 309.*

FORCE OF VOIDABLE ORDER—CONTEMPT.

4. Voidable orders are in force until they are set aside in a proper proceeding; thus, if it be admitted that an order directing a judgment debtor to appear for examination in supplemental proceedings is voidable, that will not relieve him from contempt proceedings for a failure to comply therewith, where the court had jurisdiction of the proceedings at their inception. *State ex rel. v. Downing, 309.*

EFFECT OF REVERSING DISOBEYED ORDER.

5. The effect of a reversal of an order for disobedience of which a person has been adjudged guilty of contempt is to relieve such person from the duty of obeying the order, but it does not remit any fine that may have been imposed. *State ex rel. v. Downing, 309.*

APPEALABLE ORDER IN CONTEMPT PROCEEDING.

6. An order adjudging a person guilty of contempt and fixing his punishment is a final and appealable order, notwithstanding an additional clause that further proceedings be stayed until the further order of court, and that defendant have a stated time within which to prepare a bill of exceptions, the effect of this last clause being only to stay the enforcement of the order. *State ex rel. v. Downing, 309.*

CONTINUANCE.

TRIAL—DISCRETION OF COURT.

1. Trial courts have a large discretion in passing upon motions for continuances, but the authority so granted must be exercised according to legal principles and in such a way as to promote substantial justice. *Linn County v. Morris, 415.*

EXAMPLE OF AN ABUSE OF THIS DISCRETION.

2. During an action against the second term sureties of a county treasurer to recover for alleged defalcations there were indictments pending against him,—one for failing to account for moneys coming into his hands during the first term. A continuance was asked until the indictments were disposed of, because the treasurer refused until then to testify concerning such moneys. On trial the court found that at the close of the first term the treasurer had in his possession the sum of \$1,845, and, "in the absence of the contrary, and on the presumption that he did his official duty, the court finds that he paid said sum to himself as his own successor;" and this \$1,845 formed part of the amount for which judgment

was rendered against the sureties. *Held*, that it was error to refuse the continuance. *Linn County v. Morris*, 415.

CONTRACTS.

INTERPRETATION OF CONTRACT—PLACE OF PERFORMANCE.

1. The general rule that a contract for the payment of money, entered into *bona fide* in one state, and made payable in another, will be construed and enforced according to the laws of the state where payable, is subject to the qualification that no state is bound to enforce in its courts any contract that is injurious to its public rights, or offends its morals, or contravenes its public policy.

Pacific Building Co. v. Hill, 280; *Hicinbothen v. Interstate Loan Assoc.* 511.

CONTRACT OF COUNTY—RATIFICATION.

2. A public corporation has the same power to ratify an unauthorized contract that an individual has, provided it is one that the corporation might have made in the first instance; and a ratification is equivalent to an original authorization.

Steiner v. Polk County, 124.

RECEIPT AS A CONTRACT—PAROL EVIDENCE.

3. A mere receipt is always open to parol explanation, but when it is also the expression of a contract, it is subject to the same rules as other contracts.

Milas v. Obvacevich, 239.

WILL—CONTRACT—MUTUALITY.

4. A writing reciting that the maker, being in sound mind, "declares this to be my last will; that is, * * I give J. the rest of my property," does not constitute a contract between the parties, no obligation being assumed by either, and may be revoked by the maker.

Richardson v. Orth, 252.

CONTRIBUTORY NEGLIGENCE. See MASTER AND SERVANT, 2.

CORPORATIONS.

WHEN INSTALLMENT STOCK SUBSCRIPTIONS ARE PAYABLE.

1. Subscriptions for corporate stock are payable as the directors may call for them, or as the by-laws may provide, and the statute of limitations commences to run against the liability of the subscriber accordingly; thus, where the by-laws make the stock payable in monthly installments, the statute runs against each installment from the time it was payable, without any call or action by the corporation or the directors or officers.

Hawkins v. Donnerberg, 97.

UNPAID SUBSCRIPTIONS—LIMITATION OF ACTION.

2. Creditors of a corporation cannot enforce the liability of stockholders for unpaid subscriptions to capital stock after the corporation's right to collect such subscriptions has become barred by the statute of limitations.

Hawkins v. Donnerberg, 97.

BUILDING AND LOAN COMPANIES NOT BANKING CORPORATIONS.

3. A foreign corporation making loans upon security of real estate and pledges of its own stock is not a "banking corporation," within Hill's Ann. Laws, §§ 3276, 3277, requiring such a corporation to record a power of attorney in each county where it has a resident agent.

Pacific Bldg. Co. v. Hill, 280.

TORT BY CORPORATION—LIABILITY FOR ACTS OF OFFICERS.

4. Where the officers of a corporation, who exercise the whole executive power, participate in and direct all that is done in the commission of a tort, their malicious, wanton, or oppressive intent may be treated as the intent of the corporation, and it may be compelled to respond to punitive damages.

Bingham v. Lipman, 353.

INSTRUCTIONS AS TO LIABILITY FOR TORTS.

5. Where the evidence showed that the chief executive officials of a corporation either did or authorized all the acts constituting a tort, instructions regarding the liability of the corporation for punitive damages must be interpreted accordingly.

and are not to be deemed erroneous because they may be broad enough to make the corporation liable in such damages for the acts of any of its officials, regardless of rank.
Bingham v. Lipman, 368.

POWER TO MAKE RECEIVER'S DEBTS A PREFERRED LIEN.

6. In appointing receivers of corporations not *quasi* public in character, or authorizing their receivers to continue the business of such corporations, courts of equity cannot, without the consent of prior lien creditors, decree that the debts of such receivers incurred in carrying on the business of the defendant corporation shall take precedence over prior contract liens.

United States Invest. Corp. v. Portland Hospital, 523.

COSTS AND DISBURSEMENTS.

MUTUAL OPEN ACCOUNTS.

1. An account on which payments have been made, but against which there are no counter demands, is an open but not a mutual account, and a judgment for less than \$50 on such a claim does not carry costs under sections 549 and 551 of Hill's Ann. Laws.
Altree v. Gregson, 599.

REASONABLE TIME FOR FILING COST BILL IN SUPREME COURT.

2. Cost bills should be filed in the supreme court within a reasonable time after the decision of the case, but under Rules 20, 21, and 22, providing a certain time within which parties may apply for a rehearing, and that the mandate shall not be issued until such application is disposed of, it may sometimes be that the balance of the term at which the case was decided will not be "a reasonable time" for filing the cost bill, as in this case.
Richardson v. Orth, 252.

ASCERTAINING COSTS BEFORE ISSUING MANDATE.

3. Rule 22 of this court, providing that, within sixty days after disposition of an appeal or petition for rehearing, a mandate shall issue as of course on the application of either party, does not preclude the clerk, on application being made, from filling in blanks left for the amount of costs and disbursements.

Richardson v. Orth, 252.

APPEAL—DEFINITENESS OF OBJECTIONS TO COST BILL.

4. Under Section 556 of Hill's Ann. Laws, objections to a cost bill should be sufficiently definite to apprise the adverse party of the particulars wherein the disputed items are claimed to be unwarranted, and this rule is sufficiently complied with by a series of objections stating that the alleged cost of the transcript is excessive because it was for unnecessary documents, and that the abstract contains a certain amount of irrelevant matter, and that the cost of printing the brief, exclusive of repetitions and irrelevant matter, would not exceed a stated amount.

Ferguson v. Byers, 468.

APPEAL—COST OF UNNECESSARY MATTER IN TRANSCRIPT.

5. Under Rules 1 and 2 of the supreme court (35 Or. 587, 588), a transcript should contain only the papers specified therein, and where other papers have been copied into the record the charge for such copying should not be allowed in the cost bill; as, for example, the losing party should not be obliged to pay for the repetition of the title of the case, the repetition of the cost bill, the file marks on the papers, the signatures of officers and attorneys, and such irrelevant matter.

Ferguson v. Byers, 468.

APPEAL—COST OF UNNECESSARY MATTER IN ABSTRACT.

6. Parties who include unnecessary matter in their abstracts, or who unnecessarily repeat papers, and especially long indorsements and file marks, should not be allowed the expense of printing them, under Rules 4 and 24 (35 Or. 587, 591, 608).

Ferguson v. Byers, 468.

APPEAL—COST OF UNNECESSARY MATTER IN BRIEF.

7. Parties printing briefs in the supreme court should not reproduce the matter required by the rules to be in the abstract, and where they do so the expense thereof should not be allowed as part of the costs.

Ferguson v. Byers, 468.

APPEAL—CLERICAL EXPENSE OF COPYING PAPERS.

8. A successful party in the supreme court is not entitled to recover as an item of costs the expense of copying the papers used in preparing the case on appeal.

Ferguson v. Byers, 408.

COUNTERCLAIM.

Effect on of Motion for Nonsuit. See SET-OFF AND COUNTERCLAIM, 1.

COUNTIES.**CONTRACT OF COUNTY—RATIFICATION.**

1. A public corporation has the same power to ratify an unauthorized contract that an individual has, provided it is one that the corporation might have made in the first instance; and a ratification is equivalent to an original authorization: thus, where the county judge advised that a wounded pauper be taken to a hospital for treatment, and requested a physician to render professional services to such pauper, and present his bill to the county court, and the court afterwards allowed and paid bills for care, board, and hospital charges, such action constituted a ratification of the arrangement made by the judge, so as to render the county liable for the value of the physician's services. *Steiner v. Polk County*, 124.

PRIMARY ELECTION LAW—APPORTIONMENT OF EXPENSE.

2. The expenses of primary elections in certain cities, held under Laws, 1901, p. 317, being an incident to a general law, may be imposed upon the counties in which such cities are located.

Ladd v. Holmes, 167.

CHARGE FOR COPYING PAPERS FOR COUNTIES.

3. Under a statute providing a salary for a county clerk, to be exclusive of all other charges and compensation, except for furnishing copies to private parties, a county is a "private party" as to the clerk of another county, and the clerk may properly charge the other county for copies of his records.

Baker County v. Benson, 207.

PUBLIC OFFICERS—SERVICES TO PUBLIC CORPORATIONS.

4. A public officer is not entitled to demand in advance his legal charges for making copies of records for a county.

Baker County v. Benson, 207.

RIGHT OF COUNTY CLERK TO FEES IN ADVANCE.

5. Under the Const. Or. Art. I, § 18, providing that no man's particular services shall be demanded without just compensation being first assessed and tendered, "except in the case of the state," a public officer who is required to perform certain duties for a public corporation and is entitled to collect fees therefor, cannot insist on having his money before doing the work, since the public corporation is a part of the state, and therefore within the excepting clause.

Baker County v. Benson, 207.

CHANGING COUNTIES—APPORTIONING DEBT.

6. It is not an objection to an act annexing part of one county to another county that the former has a right to the taxes for the current year to use for its current expenses and debt, of which it cannot be deprived by an arbitrary legislative act, where the act provides that the county to which the land is annexed shall pay a stated just proportion of the indebtedness of the county from which the land is taken.

Baker County v. Benson, 207.

CHANGING COUNTIES—COLLATERAL PROCEEDING.

7. It is a general rule that in a collateral proceeding the constitutionality of a statute will not be considered; thus, in a mandamus proceeding by Baker County to compel the clerk of Union County to make and deliver to it certain transcripts as required by a legislative act annexing part of Union County to Baker County, the court will assume that the act is valid.

Baker County v. Benson, 207.

CHANGING COUNTIES—LOCAL AND SPECIAL ACT.

8. An act annexing a part of one county to another county, such as Laws, 1901, p. 435, adding to Baker County a part of Union County, is both local and special,

within the meaning of the Const. Or. Art. I, § 21, stating the conditions on which certain "local and special laws" may take effect. *Baker County v. Benson*, 207.

CHANGING COUNTIES—NECESSITY OF POPULAR VOTE.

9. The expression in the Const. Or. Art I, § 21, that no law shall be passed, the taking effect of which shall be made to depend on any authority, except as provided by the constitution, "provided local and special laws may take effect or not, upon a vote of the electors interested," does not make it obligatory on the legislature to submit to the interested electors the question whether certain territory in one county should be separated therefrom and annexed to another.

Baker County v. Benson, 207.

CONSTITUTIONALITY OF CHANGE IN SENATORIAL DISTRICTS.

10. An act annexing part of a county in one senatorial district to another county in the different district is not unconstitutional as violating Const. Or. Art. IV, §§ 8, 5, 6, 7, regulating the apportionment of senators among the several counties.

Baker County v. Benson, 207.

CHANGING COUNTIES—COURSES—MONUMENTS.

11. It is a general rule that monuments control courses and distances in construing descriptions of land, but this must yield to the superior rule that the entire instrument must be considered with its surrounding circumstances and upheld if reasonably possible. For example, a legislative act (Laws, 1901, p. 435), annexing part of one county to another, described the boundary line of the annexed portion, in part, as running east along a certain township line to the west county line; thence easterly along the west county line to a river. The west county line referred to ran in an easterly direction along the summit of certain mountains to a particular point, and thence due east to the river referred to; and the township line, when extended as described, did not intersect but ran south of the summit of the mountains. It was held that the court would assume that the legislature intended the line to be extended east to the river, unless it intersected the county line, in which event it was to follow the county line, and that by thus disregarding the county line the description was sufficiently certain, and the act valid.

Baker County v. Benson, 207.

COUNTY CLERKS. Same as **CLERKS OF COURTS**.

COUNTY COURTS.

Power of to Settle Accounts of Deceased or Removed Administrators or Guardians. See **COURTS**, 4, 5.

COURSES AND DISTANCES. See **BOUNDARIES**.

COURTS.

POWER OF SUPREME COURT TO DIRECT A PARTICULAR JUDGMENT.

1. On appeal from a judgment in a law action tried before a judge alone, the supreme court may remand the case with a direction to enter a particular judgment, if all the facts have been found; but if no finding has been made on a material point, the case must go back for a new trial.

Pacific Lum. Co. v. Prescott, 374.

IDEM.

2. Where, in an action to restrain the obstruction by artificial works of the flow of water through a natural depression of the bank of a stream, it is claimed that such works could be maintained with great benefit to defendant, and without injury to plaintiff, during a portion of the season, but the evidence and findings do not show during what times this might be done, the appellate court should not modify an injunction decree so as to permit such works to be maintained at any time, but will leave such matter for the trial court.

Mace v. Mace, 586.

POWER OF EQUITY TO MAKE RECEIVER'S DEBTS A PREFERRED LIEN.

8. Courts of equity cannot, without the consent of prior lien creditors, decree that the debts of receivers incurred in carrying on the business of insolvent corporations shall take precedence over prior contract liens.

United States Invest. Corp. v. Portland Hospital, 523.

PROBATE COURTS—ACCOUNTING BETWEEN ADMINISTRATORS.

4. Under Hill's Ann. Laws, § 985, giving the county court exclusive jurisdiction over the accounts of administrators, etc., and section 1078, providing that the mode of proceeding in the county court is in the nature of a suit in equity, and its jurisdiction of the parties is obtained by citation, the county court has jurisdiction of a suit by an administrator *de bonis non* to compel the representative and sureties of the first administrator, who had died, to settle the accounts of their principal.

Herren's Estate, 90.

JURISDICTION TO SETTLE ACCOUNTS OF REMOVED GUARDIAN.

5. The county court has jurisdiction to settle the accounts of a removed guardian upon the petitions of the sureties of such guardian and the guardian subsequently appointed.

Wilson's Guardianship, 353.

PROBATE—APPOINTING ADMINISTRATOR—RESIDENCE OF DECEASED.

6. Under Sections 1083 and 1085 of Hill's Ann. Laws, administration on the estate of a deceased intestate inhabitant of Oregon can be granted only by the county court of the county of which such person was an inhabitant at the time of death.

Slate's Estate, 349.

See DIVORCE, 2, 3.

COVENANTS.**ASSIGNABILITY OF PROMISES IN MORTGAGES.**

Where a mortgagor covenants to pay all taxes on the mortgage and the property, and that if not paid before they are delinquent the mortgagee may pay, and the amounts so paid shall be added to the debt and be secured by the mortgage, such covenant is binding on a grantee of the premises who assumes the payment of the mortgage, and also inures to the benefit of an assignee of the mortgage.

Windle v. Hughes, 1.

CREDITOR'S SUIT.**LIMITATION OF ACTION—RIGHT BY RELATION.**

Where a creditor of an insolvent corporation files a creditor's bill against it, another creditor who subsequently makes himself a party, and proves his claim, is entitled by relation to the benefit of the suit as a party plaintiff from the beginning, and the time that elapses from the commencement of the suit to his becoming a party is not to be construed as a part of the time limited for the commencement of an action on his claim.

Dunne v. Portland St. Ry. Co. 225.

CROSSINGS. See RAILROADS 1, 3.

CUMULATIVE EVIDENCE. When Harmless See APPEAL, 21.

CURATIVE ACTS.

Effect of Act Curing Void Street Assessments. See MUN. CORP. 15, 16.

Effect of Act Curing Sales of Tide Lands. See PUBLIC LANDS 2, 3.

DAMAGES.**BOND TO COMPLY WITH FRANCHISE—LIQUIDATED DAMAGES.**

1. Where a city has required from the grantee of a public franchise a bond conditioned that the terms of the grant shall be complied with, and the bond has been tendered and accepted, the sum specified in such bond is substantially a statutory penalty, and, upon a breach of the bond, the entire sum may be recovered, without proof of special injury.

Salem v. Anson, 339.

PUNITIVE DAMAGES IN TORT ACTIONS.

2. In actions against corporations for tort punitive damages may be allowed under proper circumstances. *Bingham v. Lipman*, 363.

ASSESSMENT OF DAMAGES BY THE COURT IN TORT ACTIONS.

3. Under Hill's Ann. Laws, § 249, subds. 1 and 2, providing that, in an action sounding in tort, when the defendant has failed to answer, the court shall assess the damages (which is by section 401 made applicable to suits in equity), it is the duty of the court to assess the damages after taking testimony, even though the defendant has answered without denying the allegations as to the amount of damages. *Gohres v. Illinois Min. Co.* 516.

DEBTOR AND CREDITOR.

See CORPORATIONS, 1, 2; FRAUDULENT CONVEYANCES.

DECEDENTS. Same as EXECUTORS AND ADMINISTRATORS.

DECLARATIONS AGAINST INTEREST. See EVIDENCE, 10.

DEFICIENCY JUDGMENT.

Assumption of Debt by Grantee of Mortgaged Land. See JUDGMENTS, 1.

DEFINITIONS. Same as WORDS AND PHRASES.

DEPARTURE. See PLEADING, 43.

DIRECTING VERDICT.

Constitutional Right to Verdict in Negligence Cases. See CONST. LAW, 11.

DISCRETION.

Granting Continuance of Trial. See CONTINUANCE.

Allowing Amendments to Pleadings. See PLEADING, 31, 32.

DISMISSAL at Trial. See TRIAL, 3.

DISMISSING APPEAL.

Practice Where Material Part of the Record has Been Struck Out and Cannot be Replaced.

See APPEAL, 9, 10.

Accidental Defect in Abstract—Amendment. See APPEAL, 14.

DIVORCE.

SHOWING FOR PERMANENT ALIMONY.

1. A showing that defendant had property worth \$9,000, and a monthly income ample to support his family, while plaintiff was entirely without means, was sufficient to justify a decree for \$20 a month permanent alimony.

Brandt v. Brandt, 477.

MODIFYING ALLOWANCE OF ALIMONY.

2. Under Section 502 of Hill's Ann. Laws, giving a court power to modify a divorce decree so far as it may provide for "the maintenance of either party to the suit," a decree may be modified so as to retrospectively cut off alimony that has already accrued, upon a proper showing.

Brandt v. Brandt, 477.

FINALITY OF ALLOWANCE OF ALIMONY.

3. Ordinarily a decree fixing alimony will be considered final as to the then existing or known conditions; still, where a decree awarding permanent alimony is not based on any consideration of property rights of the wife, but merely as a provision for her support and maintenance, the statute is sufficiently broad to authorize an order releasing defendant from the payment of further alimony for causes arising subsequently to the decree, where such course appears equitable.

Brandt v. Brandt, 477.

EFFECT ON ALIMONY OF REMARRIAGE OF WIFE.

4. The remarriage of a divorced woman who has been granted alimony is a strong reason for modifying the decree, and where such an order has been made, the husband ought not to be required to subsequently resume the payments.

Brandt v. Brandt, 477.

5. Where a wife was allowed permanent alimony, and subsequently remarried, an order releasing defendant from the payment of alimony which had accrued subsequent to such marriage, and from further payment of alimony, was proper.

Brandt v. Brandt, 477.

TITLE TO REALTY.

6. The title to realty cannot be determined in a divorce suit except as it may be incidentally involved—so that, where the case has been dismissed as to the divorce, it cannot be continued as one to obtain a reconveyance of land.

Wetmore v. Wetmore, 332.

DOCKETS.

Advancing Cause For Argument. See RULES OF COURT, 1.

DUE PROCESS OF LAW. See CONST. LAW, 10.

DUPLICITY. See PLEADING, 1.

EFFECT BY RELATION.

Repeal of Statute—Proceedings Already Started. See STATUTES, 5.

ELECTION OF REMEDIES.**ESTOPPEL—INCONSISTENT CLAIMS—ELECTION.**

1. A litigant will not be permitted to assume inconsistent positions in a legal proceeding, but must elect to pursue one remedy or another.

Kerslake v. Brower Lum. Co. 44.

APPEAL FROM JUSTICE'S COURT—REVIEW.

2. An initiation of an appeal from a judgment of a justice of the peace is not such an election of remedies as will prevent dropping the appeal by not filing the transcript and applying for a writ of review.

Feller v. Feller, 73.

ELECTIONS.**PRIMARY LAW—EQUAL PRIVILEGES AND IMMUNITIES.**

1. An election law such as Laws, 1901, p. 317, providing a method of holding primary elections for the selection of delegates to nominating conventions, denying the benefits of the act to political parties which did not cast at the next preceding election at least a specified per cent of the total vote, but permitting such minor parties to make nominations in other modes, is not in conflict with Const. Or. Art. I, § 20, prohibiting the granting to any citizen or class of citizens of privileges or immunities which upon the same terms shall not equally belong to all citizens, since the act is but a reasonable regulation of the larger parties, designed to safeguard the privileges of the electors thereof, and is not an infringement of the rights of the minor parties.

Ladd v. Holmes, 167.

PRIMARY LAW—RIGHT OF PEOPLE TO ASSEMBLE.

2. An election law such as Laws, 1901, p. 317, is not an unwarrantable invasion of the rights of political parties, nor an infringement of the rights guaranteed by Const. Or. Art. I, §§ 26, 33, securing the right of the people to peaceably assemble to consult for their common good, and prohibiting the impairing of the rights and privileges retained by the people, but is merely a regulation of party management, designed to secure to the voters a free expression of their will.

Ladd v. Holmes, 167.

PRIMARY LAW—FREE AND EQUAL ELECTIONS.

3. The Lockwood Primary Act (Laws, 1901, p. 317), providing a method of holding primary elections for the selection of delegates to nominating conventions, imposes no restraint upon electors, and does not deny to them their proper influence; and hence it is not in conflict with Const. Or. Art. II, § 1, guarantying that elections shall be "free and equal." *Ladd v. Holmes*, 167.

PRIMARY LAW—ELECTION AUTHORIZED BY LAW.

4. A law such as Laws, 1901, p. 317, requiring the holding of primary elections for the selection of delegates to nominating conventions under the supervision of public officers at public expense, provides for an election "authorized by law and not provided for by the constitution," within the meaning of Const. Or. Art. II, § 2, prescribing the qualifications of electors in all such elections.

Ladd v. Holmes, 167.

PRIMARY LAW—RIGHT OF ELECTORS TO VOTE.

5. Laws, 1901, p. 317, providing a method of holding primary elections for the selection of delegates to nominating conventions, and limiting the right of party electors to vote at their respective party primaries, is not in conflict with Const. Or. Art. II, § 2, providing that qualified electors "shall be entitled to vote at all elections authorized by law;" for the right to vote is dependent upon the residence of the elector and the nature of the election.

Ladd v. Holmes, 167

PRIMARY LAW—TITLE OF ACT.

6. Section 25 of Laws, 1901, p. 327, requiring the appointment of a county managing committee and defining its duties, is germane to and connected with the subject of the act—"to provide for primary elections in cities * * and providing the manner of conducting the same," * * —and hence the law is within the purview of Const. Or. Art. IV, § 20, requiring that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title.

Ladd v. Holmes, 167.

PRIMARY LAW—SPECIAL AND LOCAL ACT.

7. The primary election law of 1901, commonly known as the Lockwood Act (Laws, 1901, p. 317), providing a method of holding primary elections in cities having a population of ten thousand or more, "as shown by the last state or federal census," though applicable to but one city at the time of its enactment, extends to all cities as they subsequently acquire the prescribed population, as the context shows that the act was not intended to apply to only cities that had ten thousand people at the time of the last preceding census, and it is therefore neither special nor local within the meaning of the Const. Or. Art. IV, § 23.

Ladd v. Holmes, 167.

8. The act of 1901, p. 317, providing a method of holding primary elections in cities of a certain class is not a special or local law (Const. Or. Art. IV, § 23), because it provides for the punishment of offenses arising out of the violation of its provisions, since that is merely an incident of the act.

Ladd v. Holmes, 167.

PRIMARY LAW—DEPRIVATION OF POLITICAL RIGHT.

9. An election law directing that no person shall be entitled to vote at a primary election unless he shall have complied with the law relating to registration of electors and shall be entitled to vote at the next ensuing general election (Laws, 1901, pp. 317, 323,) does not exclude unregistered electors; for the registration act (Laws, 1899, p. 128), now made operative at primary elections, permits such electors to vote upon prescribed conditions.

Ladd v. Holmes, 167.

PRIMARY LAW—APPORTIONMENT OF EXPENSE.

10. The expenses of primary elections in certain cities, held under Laws, 1901, p. 317, being an incident to a general law, may be imposed upon the counties in which such cities are located.

Ladd v. Holmes, 167.

PRIMARY LAW—DISCRIMINATION AGAINST DISTRICTS.

11. Laws, 1901, p. 827, § 24, declares that political parties may provide, as they deem best, for the election of delegates to county conventions from precincts beyond the limits of cities operating under the law. Section 25 directs that the county committee shall be composed of a representative from each precinct in the county, and requires that the committee shall apportion the delegates among the precincts in accordance with the party vote polled at the last preceding election, upon a ratio determined by it. *Held*, that the act does not discriminate against country districts and deprive them of representation in the county conventions, since the delegates thereto must be apportioned in accordance with the party vote polled at the last preceding election by a committee composed of a representative from each precinct of the county. *Ladd v. Holmes*, 167.

PRIMARY LAW—REGULATING POLITICAL PARTIES.

12. Laws, 1901, p. 817, providing a method of holding primary elections for the selection of delegates to nominating conventions, is not void for failing to provide for special elections, since such failure relegates the parties in such cases to prior existing methods. *Ladd v. Holmes*, 167.

PRIMARY LAW—REASONABLE CLASSIFICATION.

13. A classified election law that operates equally upon all within a certain class, as, for example, upon all the people within cities over a given size, is based upon a reasonable distinction and is enforceable. *Ladd v. Holmes*, 167.

ELECTRICITY.**LIVE ELECTRIC WIRES—INFERENCE OF NEGLIGENCE.**

1. In actions against electric companies for injuries received from contact with live wires in public ways proof of the breaking of the wires and of the happening of the accident makes a *prima facie* case of negligence. *Boyd v. Portland Electric Co.* 126.

INJURY BY LIVE WIRE—RES IPSA LOQUITUR.

2. Where plaintiff has made a *prima facie* case of negligence by showing that an accident happened resulting in his injury, the presumption is that the accident would not have happened had proper care been taken. *Boyd v. Portland Electric Co.* 126.

NEGLIGENCE—QUESTION FOR JURY.

3. In an action against an electric company for injuries received from contact with a live wire, where plaintiff has made a *prima facie* case, and defendant has introduced evidence that the accident occurred without fault on its part, the question of negligence is for the jury. *Boyd v. Portland Electric Co.* 126.

NEGLIGENCE—INSTRUCTIONS.

4. In an action against an electric company for damages caused by a broken live wire hanging in the street, where plaintiff alleged that defendant could have known and did know of the break in time to remedy the defect, but negligently omitted to do so, it was not error to submit to the jury the question whether the company was negligent in failing to discover the break. *Boyd v. Portland Electric Co.* 126.

ELECTRICITY—CARE REQUIRED—ACT OF GOD.

5. Where the poles and wires of an electric company are properly erected and maintained, and a storm of extraordinary severity, such as could not have been reasonably expected, causes a wire to fall, and it is not permitted to remain an unreasonable time in such condition, the company will not be liable for resulting damage; but if the storm is one that should have been anticipated, the company will be liable. *Boyd v. Portland Electric Co.* 126.

EMINENT DOMAIN.

DEMAND OF PARTICULAR SERVICES BY PUBLIC CORPORATIONS.

Under Const. Or. Art. I, § 18, providing that private property shall not be taken for public use, nor the particular services of any one demanded without just compensation, "nor, except in the case of the state, without such compensation first assessed and tendered," does not authorize a county clerk, required by a statute to furnish certain transcripts to another county, to demand his compensation in advance; the county being a component part of the state, and therefore within the excepting clause.

Baker County v. Benson, 207.

EQUAL ELECTIONS. See ELECTIONS, 3.

EQUITY.

ACCOUNTINGS BY ADMINISTRATORS AND GUARDIANS.

1. Probate courts in Oregon have control over accountings by the representatives of deceased or removed executors, administrators and guardians, and no resort to equity for that purpose is necessary.

Herren's Estate, 90; *Wilson's Guardianship*, 853.

PLEAS IN EQUITY—OBJECTION TO JURISDICTION.

2. Under the practice in Oregon, the common-law pleas in equity no longer prevail, and objections to the jurisdiction are presented by other pleadings.

Moore v. Shofner, 488.

EQUITY—AVOIDING TAX-SALE CERTIFICATES AS CLOUDS ON TITLE.

3. A suit in equity may be maintained against a county to remove a cloud upon the title to realty created by tax-sale certificates held by the county, based upon a void assessment, as such suit is not in the nature of a suit to avoid payment of taxes, and in form the suit may be either a technical suit to remove a cloud or one to determine an adverse interest in the land under Section 504 of Hill's Ann. Laws.

Moores v. Clackamas County, 536.

NATURE OF SUIT UNDER SECTION 504.

4. The statutory remedy provided by Section 504 of Hill's Ann. Laws is an enlargement of the equitable remedy to remove a cloud, and may be invoked without waiting for possession to be disturbed by legal proceedings; and it also affords efficient relief against instruments and proceedings, such as tax-sale certificates, void on their face, or, if not thus void, where any attempt to enforce them would necessarily reveal their invalidity, whereas without the statute such instruments and proceedings, because of their patent invalidity, would not constitute a cloud.

Moores v. Clackamas County, 536.

ESTATES OF DECEDENTS. See EXECUTORS AND ADMINISTRATORS.

ESTOPPEL.

ELECTION BETWEEN INCONSISTENT CLAIMS.

1. A litigant will not be permitted to assume inconsistent positions in a legal proceeding, but must elect to pursue one remedy or another; as, for example, a creditor of an insolvent cannot claim part of the fund created from the assigned property, and at the same time insist that the assignment is void.

Kerslake v. Brower Lum. Co. 44.

2. Where a creditor of an insolvent wishes to repudiate an assignment on the ground that it is illegal and fraudulent, he should apply to set the assignment aside.

Kerslake v. Brower Lum. Co. 44.

WITHDRAWN CLAIM TO ATTACHED PROPERTY NOT AN ESTOPPEL.

3. Where property in the hands of an officer is claimed in writing by a stranger to the writ under which it is held, the withdrawal of the claim before the retiring

of the sheriff's jury called to try the question of title ends the trial (Hill's Ann. Laws, §§ 286, 288), and proceedings thereafter by such jury are entirely ineffective to constitute an estoppel on the claimant. *Singer Mfg. Co. v. Driver*, 332.

FRAUDULENT CONVEYANCE—MISTAKE—INNOCENT CREDITOR.

4. A person who has permitted another to obtain and hold the title to his real property for many years, and until after others have extended credit in reliance on such apparent ownership, is estopped thereby from asserting his claim as against such creditors. *Nears v. Davis*, 286.

ANSWER TO GARNISHMENT AS AN ESTOPPEL ON WAREHOUSEMAN.

5. Where a warehouseman, on being served with a copy of a writ of attachment and notice of a suit against his depositor, as specified in Hill's Ann. Laws, § 149, makes the certificate required by section 152, showing that he is in possession of certain grain received from the defendant, for which negotiable warehouse receipts were issued, such warehouseman is not estopped by the judgment in the suit against the defendant, or by the order for the sale of such grain, from showing that such depositor had transferred such receipt, and that the grain had been delivered to the purchaser. *Adamson v. Frazier*, 273.

6. Where a warehouseman, as garnishee, has made a certificate that he has certain grain received from the defendant, and for which negotiable receipts were issued, which were outstanding, and learns before judgment is recovered in the suit against the defendant that such receipts have been transferred, he is under no obligation to notify plaintiff of such fact, or to amend his certificate; nor does a failure to do so estop him from showing such fact when an attempt is made to hold him for the grain as garnishee. *Adamson v. Frazier*, 273.

EVIDENCE.

PAROL EVIDENCE TO EXPLAIN RECEIPT THAT IS ALSO A CONTRACT.

1. A mere receipt is always open to parol explanation, but when it is also the expression of a contract, it is subject to the same rules as other contracts.

Milos v. Obracevich, 239.

PAROL EVIDENCE—CONCLUSIVENESS OF MEMORANDUM.

2. The memorandum contemplated by Section 602 of Hill's Ann. Laws, is one containing the terms of the agreement between the parties, and one that refers to or includes only a part of a transaction is not conclusive to the exclusion of oral testimony. *Haines v. Cadwell*, 229.

3. A receipt that expresses the terms of a contract cannot be varied by parol, of course, but if it does not express the agreement of the parties, the real facts may be shown; and if the terms are vague or ambiguous, the surrounding circumstances may be reviewed to make clear the situation of the parties.

Hirsch v. Salem Mills Co. 601.

PAROL EVIDENCE TO EXPLAIN DISPUTED WRITING.

4. Where there is an issue in the pleadings as to whether a certain receipt contains the terms of an agreement between the parties, the question, like other disputes over facts, must be left to a jury. *Hirsch v. Salem Mills Co.* 601.

PROPRIETY OF OPINION EVIDENCE—DAMAGES.

5. Except where expert testimony is allowable, witnesses must state facts only, it being the province of a jury to draw its own conclusions; thus, in an action for damages, a witness should not be permitted to give his opinion as to the value of the injury suffered. *United States v. McCann*, 13.

JUDICIAL NOTICE.

6. Courts will in subsequent proceedings in a given case take judicial notice of their own records in that case. *Mills' Estate*, 424.

7. Courts take judicial cognizance of the times when both state and federal censuses are taken. *Ladd v. Holmes*, at p. 176.

8. The courts take judicial notice of the terms of court fixed by statute for the various counties in this state. *Feller v. Feller*, at p. 76.

RES GESTÆ—EVIDENCE OF ACTS OF AGENTS OF CONSPIRATORS.

9. Where evidence has been received tending to support a charge that defendants procured the arrest of plaintiff in pursuance of a conspiracy to extort money from her, the acts and statements of the defendants and of the officers who made the arrest, done and said in the course of the arrest and resulting detention, are competent as part of the *res gestæ*. *Jester v. Lipman*, 408.

RES ISPA LOQUITUR.

10. Where plaintiff has made a *prima facie* case of negligence by showing that an accident happened resulting in his injury, he is not obliged to prove any specific negligence, though it may have been alleged, since the presumption is that the accident would not have happened had proper care been taken.

Boyd v. Portland Electric Co. 126.

INFERENCE OF NEGLIGENCE FROM HAPPENING OF ACCIDENT.

11. In actions against electric companies for injuries received from contact with live wires in public ways, proof of the breaking of the wires and of the happening of the accident makes a *prima facie* case of negligence.

Boyd v. Portland Electric Co. 126.

DECLARATIONS AGAINST INTEREST.

12. It is always competent to give in evidence statements made by a party against his interest. *Bingham v. Lipman*, 363.

NEGATIVE PREGNANT EVIDENCE.

13. The negative pregnant rule is as applicable to evidence as to pleading, and the same result follows its enforcement; thus, where the point in issue was the ability of a person to pay a judgment for \$7,817, his evidence that he had not had and had not at the time of testifying \$10,000 in lawful money, was an admission that he had a less sum, and justified a finding that he could pay the judgment if he would. *State ex rel. v. Downing*, 309.

BURDEN OF PROOF IN ACCOUNTINGS.

14. Where, in a suit against the representative and sureties of a deceased or removed administrator or guardian, it is shown that a certain sum was on hand when the last report was made, the burden of proof is on the defendant to show the proper administration of such fund.

Herren's Estate, 90; *Wilson's Guardianship*, 352.

EFFECT OF ADMITTING NOTE AND PLEADING PAYMENT.

15. An answer in an action on a note, expressly admitting the execution of the note, and pleading payment thereof is a sufficient admission of its execution to dispense with proof thereof. *Creedy v. Joy*, 28.

EXCEPTIONS, BILL OF.

MAKING REPORTER'S NOTES A PART OF.

1. A document which consists of a copy of all the proceedings at a trial, with an order of court directing the clerk to attach it to the bill of exceptions, and which is so attached, is not a part of such bill. An identification of a transcript of the stenographer's notes by the trial judge, with a direction to attach it to the bill of exceptions does not make such transcript a part of the bill.

Nosler v. Coos Bay Nav. Co. 305.

2. Under Section 282, Hill's Ann. Laws, directing that a bill of exceptions shall set out the objections made with only so much matter as may be necessary to explain them, a transcript of all the proceedings during the trial is not a bill of exceptions.

Nosler v. Coos Bay Nav. Co. 305.

EFFECT OF MOTION TO STRIKE BILL OF EXCEPTIONS.

3. Where an appeal was taken in the manner and within the time prescribed by law, and abstracts and briefs were filed as required by the rules of court, the

appeal will not be dismissed, or judgment affirmed, on motion to strike the transcript because of defects in the bill of exceptions, since the jurisdiction of the court and the sufficiency of the complaint could not be raised without a bill of exceptions, and a defective bill might be amended; but where part of a record has been stricken out, and the remaining record is not sufficient to raise the questions on which the appeal was taken, the motion to strike may be considered as a motion to affirm.

Nosler v. Ches Bay Nav. Co. 305.

EXECUTION.

EXECUTION AGAINST PROPERTY OF DECEDENTS.

1. Under Section 281 of Hill's Ann. Laws, providing that an execution may issue on a judgment against a deceased debtor, "and may be executed in the same manner and with the same effect as if he were still living, but such execution shall not issue within six months from the granting of letters testamentary or of administration, without leave of the county court," an execution cannot issue against the property of a deceased debtor prior to the appointment of an executor or administrator.

Watson v. Moore, 204.

SUPPLEMENTAL PROCEEDINGS—WHO MAY MAKE FINAL ORDER.

2. Under Section 308 of Hill's Ann. Laws, providing that after the issuing of an execution, and on proof to the satisfaction of the court or judge thereof that the judgment debtor has property liable to execution which he refuses to apply toward the satisfaction of the judgment, such court or judge may by an order require the judgment debtor to appear and answer under oath concerning the same; and section 309, providing that if it appears by the examination of witnesses that the judgment debtor has any property liable to execution, the court or judge shall make an order requiring the judgment debtor to apply the same in satisfaction of the judgment; the preliminary order for the examination of the judgment debtor may be made by the judge, and the final order requiring the satisfaction of the judgment may be made by the court.

State ex rel v. Downing, 309.

EFFECT OF FAILURE OF DEBTOR TO APPEAR BEFORE REFEREE.

3. The failure or refusal of a judgment debtor to appear before a referee for examination regarding property that he may have liable to execution, pursuant to an order issued under the authority conferred by Section 308 of Hill's Ann. Laws, does not affect the validity of any order that such referee may make under section 309.

State ex rel. v. Downing, 309.

SUPPLEMENTAL PROCEEDINGS—LEVY ON TANGIBLE PROPERTY.

4. A judgment creditor is not required to levy on and sell tangible property of the judgment debtor before invoking the aid of supplemental proceedings under Section 308 of Hill's Ann. Laws, as the statute authorizes such proceedings on the issuing of an execution and proof that the judgment debtor has property subject to execution which he refuses to apply toward the satisfaction of the judgment.

State ex rel. v. Downing, 309.

NECESSITY FOR PRIOR SALE OF ATTACHED PROPERTY.

5. The statement in the affidavit in proceedings supplemental to execution that the judgment debtor had property liable to execution which he refused to apply toward the satisfaction of the judgment, if believed by the court or judge, is sufficient to authorize the issuance of an order requiring the judgment debtor to appear for examination and to satisfy the judgment, notwithstanding an attachment of tangible property without levy of execution thereon.

State ex rel. v. Downing, 309.

SUPPLEMENTAL PROCEEDINGS—APPEAL—STAYING EXECUTION.

6. An appeal from an order in supplemental proceedings requiring the judgment debtor to satisfy the judgment will not operate as a stay of such proceedings, in the absence of an undertaking by the judgment debtor for the satisfac-

tion of so much of the order as may be affirmed, since the order is so closely connected with the judgment as to be a part thereof, and fall within the meaning of Hill's Ann. Laws, § 538, subd. 1, which requires that in order to stay proceedings on a money judgment there must be an appeal supported by an undertaking to satisfy the judgment if affirmed. *State ex rel v. Downing*, 309.

SUFFICIENT DESCRIPTION OF JUDGMENT IN WRIT.

7. A decree in divorce dissolved the bonds of matrimony, awarded permanent alimony to the amount of \$20 a month, and \$128 for costs and living expenses *pendente lite*. Subsequently, after considerable alimony was due, an execution was issued in favor of the complainant in divorce, and against defendant, but which failed to show that it was rendered in a divorce suit, and merely recited that plaintiff had obtained a judgment against defendant for \$128, which was enrolled in the clerk's office, etc.; and on motion to recall the execution defendant contended that the execution was void for uncertainty. *Held*, that the contention was without merit, since, the attack being collateral, and it being sufficiently evident that the execution issued on the decree, the deficiency of the execution as to the recital of the amount covered, etc., would be disregarded.

Brandt v. Brandt, 477.

EXECUTORS AND ADMINISTRATORS.

POWER TO APPOINT ADMINISTRATOR—RESIDENCE OF DECEASED.

1. Under Sections 1083 and 1085 of Hill's Ann. Laws, administration on the estate of a deceased intestate inhabitant of Oregon can be granted only by the county court of the county of which such person was an inhabitant at the time of death. *State's Estate*, 349.

POWER TO COMPEL ACCOUNTING BETWEEN ADMINISTRATORS.

2. Under Hill's Ann. Laws, § 985, giving the county court exclusive jurisdiction over the accounts of administrators, etc., and section 1078, providing that the mode of proceeding in the county court is in the nature of a suit in equity, and its jurisdiction of the parties is obtained by citation, the county court has jurisdiction of a suit by an administrator *de bonis non* to compel the representative and sureties of the first administrator, who had died, to settle the accounts of their principal. *Herren's Estate*, 90.

NEED OF BOND AND OATH.

3. Where a will fixes the amount of the executor's bond at a sum that is reasonable in proportion to the value of the estate, and such bond has been given to the satisfaction of the county court, the executor need not take the oath prescribed by Section 1088 of Hill's Ann. Laws, provided for in cases where the bond is dispensed with by the testator. *Conser's Estate*, 138.

OBJECT OF NOTICE TO CLAIMANTS.

4. The object of Hill's Ann. Laws, § 1131, requiring every executor to publish a notice of the time and place for presenting claims against the estate is to give that information to interested persons, and the giving of such notice is not a prerequisite to the right of the executor to enter on the discharge of his duties. *Conser's Estate*, 138.

NECESSITY OF INVENTORY—FINAL ACCOUNT.

5. The requirements of Section 1112, Hill's Ann. Laws, as to the filing of an inventory of an estate, should be substantially complied with, but if some of the property shall be omitted, or even if no inventory whatever shall be filed, the validity of the final account will not be affected if the property of the estate has been accounted for; in short, the settlement of a final account is to be determined by its own accuracy and completeness, and not by the inventory at all. *Conser's Estate*, 138.

REASONS FOR REMOVAL OF AN ADMINISTRATOR.

6. Under Hill's Ann. Laws, §§ 1094, 1100, authorizing the removal of any administrator who has been unfaithful to or neglected his trust, an administrator who has sold real estate under order of the county court and reported that the sale

was for cash, and then, in pursuance of an order of confirmation, has delivered to the purchaser a deed, all without receiving any money, is guilty of such neglect of his trust as to justify his removal. *Mills' Estate, 424.*

7. A statement in a petition for the removal of an administrator that the estate is indebted to petitioner, that certain prior proceedings therein, which are referred to, show the nature and history of petitioner's claim, is not a statement of a conclusion, but is a sufficient allegation of petitioner's interest to show his right to petition under Hill's Ann. Laws, § 1094, authorizing any creditor or person interested in an estate to petition for the removal of an administrator, as the court will take judicial notice of the record of such former proceedings.

Mills' Estate, 424.

WHO MAY PETITION FOR REMOVAL OF AN ADMINISTRATOR.

8. A person who has performed services for an estate, a claim for which has been allowed by the county court, has an interest in such estate sufficient to authorize him to petition for the removal of the administrator, under Hill's Ann. Laws, § 1094, providing that any creditor of an estate, or any person interested therein, may apply for the removal of an administrator. *Mills' Estate, 424.*

EFFECT OF REMOVAL OF ADMINISTRATOR ON HIS AUTHORITY.

9. An administrator removed by the county court is thereby divested of all power to pay any claim against the estate, and his act in appropriating funds of the estate to the satisfaction of its indebtedness to him is a nullity.

Rutenic v. Hamakar, 444.

ACCOUNTING—LAST ACCOUNT IS PRESUMABLY CORRECT.

10. For the purpose of an accounting with an administrator the county court may properly assume the correctness of the last report on file and charge the administrator and his sureties with the money there stated to be on hand.

Herren's Estate, 90; Rutenic v. Hamakar, 444.

ACCOUNTING—APPRAISED VALUE—LOSS—BURDEN OF PROOF.

11. Where there is any loss in value of the assets of an estate as shown by the inventory of the executor, the burden is on him to show that the loss occurred without fault on his part, but this is done when it appears that specified property brought all it was reasonably worth.

Conser's Estate, 138.

ACCOUNTING—NEED OF CITATION.

12. In probate as in other legal proceedings a voluntary appearance dispenses with the need of a citation—and where an administrator answered a petition for an order requiring him to account, and appeared at the hearing on the petition, but refused to attend afterward, an order settling his accounts is conclusive on him and on his official sureties, for his voluntary appearance conferred jurisdiction.

Rutenic v. Hamakar, 444.

PLEADINGS ON OBJECTIONS TO FINAL ACCOUNTS.

13. A convenient practice in the settlement of final accounts in probate is to consider the issues as made by the account and the objections thereto, without requiring a reply by the executor.

Conser's Estate, 138.

SET-OFF TO CLAIM DUE AN ESTATE.

14. In an action by an administrator of an insolvent estate to recover a sum claimed by the estate, the defendant cannot set off a claim due from the deceased or his estate, for he would thereby obtain a preference over other creditors—though perhaps the rule may be otherwise when the estate is solvent.

Rutenic v. Hamakar, 444.

OBJECTIONS TO FINAL ACCOUNT—SETTING ASIDE SALE.

15. On objections to the final accounting of an executor, a contention that the sale of real estate by him should be set aside because made for an inadequate sum cannot be considered, the purchaser not being a party to the proceedings, and there being no process by which he might be brought in.

Conser's Estate, 138.

CLAIMANTS AGAINST ESTATES—TECHNICAL OBJECTIONS.

16. A residuary legatee is not a claimant against an estate within the meaning of Section 1181 of Hill's Ann. Laws; but if he were, some injury must be shown before he will be permitted to object to the final account because some technical requirement has been imperfectly complied with. *Conser's Estate*, 138.

RIGHT OF ADMINISTRATOR DE BONIS NON TO SUE.

17. Under Hill's Ann. Laws, §§ 1008, 1009, providing that on the death or removal of an administrator a new one shall be appointed, who shall be entitled to the exclusive administration of the estate, and to maintain any necessary action against the administrator ceasing to act, or against his sureties or representatives, an administrator *de bonis non* may recover from the representative of the former administrator or his sureties assets converted by the first administrator. *Herren's Estate*, 90.

EXECUTION AGAINST PROPERTY OF DECEDENTS—STATUTES.

18. Under Section 281 of Hill's Ann. Laws, providing that an execution may issue on a judgment against a deceased debtor, "and may be executed in the same manner and with the same effect as if he were still living, but such execution shall not issue within six months from the granting of letters testamentary or of administration without leave of the county court," an execution cannot issue against the property of a deceased debtor prior to the appointment of an executor or administrator. *Watson v. Moore*, 201.

NATURE OF CLAIM OF ATTORNEY FOR AN ESTATE.

19. The claim of an attorney against an administrator for services rendered to an estate is a claim against both the administrator and the estate, and it is not affected in any way by the failure of the administrator to perform his trust duty. *Mills' Estate*, 424.

WHEN ATTORNEY'S FEES MAY BE ALLOWED.

20. Section 1178 of Hill's Ann. Laws, authorizing the allowance of attorney's fees to an administrator in the settlement of his account, does not limit the right to grant such fees to the final settlement, and the county court may make allowances to the attorneys during the time the estate is being settled. *Mills' Estate*, 424.

EVIDENCE OF ALLOWED CLAIM AGAINST AN ESTATE.

21. An order of a county court that a certain sum demanded for services to an administrator "is a legal and valid claim against said estate for expenses of administration," establishes the demand as an allowed claim, and makes the owner thereof a creditor of the estate. *Mills' Estate*, 424.

A SALE AT A REDUCED VALUE NOT A COMPOSITION.

22. A sale of a debt to a third person by an executor under an order of court is not a composition of the debt, though the sale is for less than the appraised value. *Conser's Estate*, 138.

EFFECT OF NOT ENTERING AN ORDER CONFERRING AUTHORITY.

23. Where an order has actually been made by a judge, the failure to enter it in the journal, or the loss of a paper on which the order was based, does not affect the good faith of the officer who acts under such an order; thus, where an executor petitioned and obtained an order from the county court to sell, at private sale, a certain note, secured by mortgage, the fact that the petition was not filed with the clerk nor the order entered in the journal could not affect the *bona fides* of the transaction on the part of the executor. *Conser's Estate*, 138.

EXEMPLARY DAMAGES for Torts. See TORTS.

EXPERT EVIDENCE.

Witness Should be Shown to be Skilled. See WITNESSES, 2.

FALSE IMPRISONMENT.**FORCE NECESSARY TO CONSTITUTE UNLAWFUL IMPRISONMENT.**

1. Submission to threatened and reasonably apprehended force constitutes an unlawful imprisonment—actual force need not have been used nor threatened.

Bingham v. Lipman, 363.

ACTION FOR FALSE IMPRISONMENT—PLEADING CONSPIRACY.

2. In an action of damages against several persons for false imprisonment an allegation of conspiracy may be treated as matter in aggravation or explanation, and is not an essential averment, since the recovery may be joint or several.

Bingham v. Lipman, 363.

FEES.

Right of Public Officials to Compensation—Charges Against Public Corporations—Demanding Fees in Advance. See **CLERKS OF COURTS**.

FELLOW-SERVANTS. See **MASTER AND SERVANT**, 6, 7.

FILING

New Undertakings on Appeal. See **APPEAL**, 4, 5.

Transcript After Objections to Sureties. See **APPEAL**, 11.

Assignments of Error—Abstracts. See **APPEAL**, 14.

FINAL ACCOUNTS of Executors.

Effect on of Not Filing Inventory. See **EXS. AND ADMRS.** 5.

Pleadings in Settling Objections To. See **EXS. AND ADMRS.** 13.

Objections To—Setting Aside a Sale. See **EXS. AND ADMRS.** 15.

FINAL ORDER. See **APPEAL**, 12.

FINDINGS OF FACT.

Findings Should Follow Pleadings. See **REFERENCE**, 1.

Construction of Certain Findings. See **TRIAL**, 11.

Immaterial Findings Are Harmless. See **APPEAL**, 21.

Need of Findings on Subordinate Points. See **TRIAL**, 12.

Subjects Properly to be Covered by Findings. See **REFERENCE**, 1, 2, 3.

FIRE COMMISSIONERS.

Relation of Board of Fire Commissioners to a City and Liability of the City for its Acts. See **MUNIC. CORP.** 8, 9.

FOREIGN CORPORATIONS. See **CONFLICT OF LAWS**.

FRAUDS, STATUTE OF. Same as **STATUTE OF FRAUDS**.

FRAUDULENT CONVEYANCES.**GENERAL RULES.**

1. In considering whether conveyances made by debtors are fraudulent, several rules are well established, among which may be mentioned these: the grantee must know of the intent to hinder and defraud and acquiesce therein; the fraud may be inferred from surrounding circumstances; and conveyances between relatives will always be very closely examined.

Garnier v. Wheeler, 193.

CONVEYANCE TO RELATIVE—BURDEN OF PROOF.

2. Where valuable property is conveyed by an insolvent to relatives, the transaction is closely scrutinized, the presumption being that there was a fraudulent intent by both parties; and the burden of proof is on the defendants to show the *bona fides* of the transfer.

Wright v. Craig, 191; *Garnier v. Wheeler*, 193.

EVIDENCE OF FRAUDULENT INTENT.

3. The evidence here satisfies the court that the grantee did not participate in the fraudulent intent of the grantor, but the consideration was inadequate.

Wright v. Craig, 191.

4. The evidence does not show that the grantee in the conveyance in question participated in the fraudulent intent of the grantor, if it be conceded that the latter meant to delay his creditors. *Garnier v. Wheeler*, 198.

EFFECT OF INADEQUATE CONSIDERATION.

5. Where the amount of the indebtedness to a wife was about \$4,000, and the property conveyed by her insolvent husband was worth \$8,000, the property will be ordered sold, and the amount due the wife declared a lien on the premises in her favor, superior to that of the judgment of her husband's creditors.

Wright v. Craig, 191.

PERMITTING ANOTHER TO HOLD APPARENT TITLE.

6. Where a husband purchased land with his wife's money, and by mistake the conveyance was in his name, but the wife was notified, and allowed the husband to manage the estate as though it were his own for twenty-eight years, a conveyance from the husband to the wife should be held void as to creditors who became such on the faith of the husband's apparent ownership. *Sears v. Davis*, 236.

FREE ELECTIONS. See **ELECTIONS**, 3.

FRIVOLOUS PLEADING Defined. See **PLEADING**, 2.

GARNISHMENT. See also **ATTACHMENT**.

WAREHOUSE RECEIPTS AS REPRESENTING PROPERTY.

1. Property stored in a warehouse and represented by a receipt cannot be attached as belonging to the depositor if he has theretofore indorsed his receipt.

Adamson v. Frazier, 273.

LIABILITY OF GARNISHEE ON ANSWER.

2. An answer by a warehouseman garnishee that he has in his care certain property stored by the defendant in the writ, for which he has issued negotiable warehouse receipts, is not a statement that such property still belongs to the person who stored it, and if the property is afterwards claimed by genuine transferees of the warehouse receipts, the garnishee will not be liable on his answer, even though the case has proceeded to judgment, and an order has been entered directing the sale of the attached property described in his answer.

Adamson v. Frazier, 273.

EFFECT ON GARNISHEE OF ADMITTING INDEBTEDNESS.

3. Where a garnishee by his answer to the writ admits an indebtedness to the attachment or execution debtor, a judgment may be entered that the officer collect such debt out of his property if he refuses to pay it on demand; but no personal judgment can be entered against him.

Adamson v. Frazier, 273.

GRADE CROSSING.

Collision With Train—Duty to Look and Listen. See **RAILROADS**, 3.

GUARANTY.

GUARANTY OF NOTE—DEMANDING PAYMENT OF MAKER.

1. A guarantee of payment is an absolute promise to pay the guaranteed obligation when due, no demand or notice is necessary to hold the guarantor, and mere passiveness on the part of the holder will not release the guarantor.

Delsman v. Friedlander, 33.

NOTE—MEANING OF AN INDORSEMENT.

2. An indorsement by the payee of a promissory note of the words, "I hereby guaranty payment of the within, and waive demand, notice of protest, and protest," on the back thereof is a contract of indorsement and not of guaranty.

Delsman v. Friedlander, 33.

GUARDIAN AND WARD.

GUARDIAN'S ACCOUNTS—JURISDICTION OF PROBATE COURT.

1. A probate court has jurisdiction to settle the accounts of a removed guardian, upon the petition of a subsequently appointed guardian, whatever may be the rule upon the intervention of the sureties of the first guardian.

Wilson's Guardianship, 353.

GUARDIAN'S ACCOUNTS—NECESSARY PARTIES.

2. In a proceeding to settle the accounts of a removed guardian without attempting to surcharge his accounts, but merely to determine whether additional credits should be allowed, the removed guardian is not a necessary party.

Wilson's Guardianship, 353

GUARDIAN'S ACCOUNT—JURISDICTION TO DETERMINE.

3. A proceeding to settle the accounts of a removed guardian, and to determine whether he should be allowed further credits, as claimed by his sureties, is within the jurisdiction of the county court, and a recourse to a court of general equity jurisdiction need not be had.

Wilson's Guardianship, 353.

EXPENDITURES OF WARD'S FUNDS.

4. Though a guardian ought not to incur expenses for the support of his ward without a direction from the county court, yet if he does incur such expenses, and clearly shows the necessity therefor, he should be allowed credit for such expenditures in the settlement of his accounts, if they are such as the court would have originally authorized.

Wilson's Guardianship, 353.

SUFFICIENCY OF EVIDENCE.

5. The evidence adduced does not seem to justify the conclusion of the probate court that the guardian did expend for the care and support of his wards the sum allowed his sureties as a credit, and the decree will be modified by reducing the credit to \$462.

Wilson's Guardianship, 353.

HARMLESS ERROR. See APPEAL AND ERROR, 21, 22, 23.

HUSBAND AND WIFE.

Will of Unmarried Woman—Revocation of by Marriage. See WILLS, 14.

IMPLIED AMENDMENT OR REPEAL. See STATUTES, 6.

IMPROPER REMARKS OF JUDGE. See TRIAL, 5.

INCONSISTENT DEFENSES. See PLEADING, 19, 20, 21.

INDORSEMENT.

Effect of Certain Words on a Note. See BILLS AND NOTES, 6.

INFERENCE.

Deduction From Happening of an Accident. See NEGLIGENCE, 3.

INFORMATION AND BELIEF.

Denial of Matter Within Pleader's Knowledge. See PLEADING, 16.

INJUNCTION.

EQUITABLE JURISDICTION TO RESTRAIN WASTE.

Where the owners of lands contract with another, whereby the latter has the right of removing certain timber from the lands, and he and a third person, acting at his instance, remove timber not embraced in the contract, there is such privity of estate between the owners and the others that a suit will lie on behalf of the owners to restrain the waste.

Elliott v. Bloyd, 326.

INSTALLMENT Stock Subscriptions. When Are Payable. See CORP. 1.

INSTRUCTIONS TO JURIES.

Duplicate Instructions Need Not be Given. See TRIAL, 6.

Matters Not in Issue Need Not be Referred to. See TRIAL, 7.

Instruction Limiting the Applicability of Certain Evidence to Specified Parties Should be Requested. See TRIAL, 10.

Manner of Presenting Theories of Respective Parties. See TRIAL, 9.

INTEREST.

NOTE—HIGHER INTEREST AFTER DEFAULT—LIQUIDATED DAMAGES.

A provision in a promissory note that if the note shall not be paid at maturity it shall thereafter bear a specified higher rate of interest than before maturity (such higher agreed rate being less than the highest legal rate) is not an agreement for a penalty, and not properly enforceable in equity, but it is rather an agreement for liquidated damages, which the parties are at liberty to make if they choose.

Close v. Riddle, 592.

INTOXICATING LIQUORS.

CONSTRUCTION OF CITY CHARTER—INTOXICATING LIQUORS.

1. The 1901 charter of the City of Ashland (Laws, 1901, p. 287), considered in its entirety, confers on the city council power to regulate the sale of intoxicating liquors, and to require a license therefor, and not merely a power to license and regulate barrooms and drinking houses and places where liquor was sold.

Houck v. Ashland, 117.

ORDINANCE—PROHIBITING SALES OF INTOXICATING LIQUORS.

2. Ashland City Charter (Laws, 1901, p. 287,) provided that the city council should annually vote on the question as to whether a license should be issued for the sale of intoxicating liquors for the ensuing year, and that, if the majority voted in the negative, no license should be issued during that time. After the time when the first vote had presumably been taken, an ordinance was passed making it a misdemeanor for any person to sell liquor without a license. *Held*, that by its failure to provide a means by which licenses could be obtained, and by the ordinance passed, making it an offense to sell without a license, the city had effectually prohibited the sale of liquor, and no prohibitory ordinance was necessary to prosecute for sales.

Houck v. Ashland, 117.

INVENTORY

Of Estates—Purpose and Need Of. See EXECUTORS AND ADMINISTRATORS, 5.

IRRIGATION. Same as WATERS AND WATER RIGHTS.

JOINT AND SEVERAL JUDGMENTS. See TORTS, 3.

JOINT TORTFEASORS. Liability of. See TORTS, 3.

JUDGMENTS.

PERSONAL LIABILITY OF GRANTEE OF MORTGAGED PROPERTY.

1. Where a grantee accepts a deed containing a provision that the land is incumbered by a specified mortgage, which is to be paid by him as a part of the price, he thereby assumes the debt, and a personal judgment for the deficiency may be entered against him on foreclosure.

Windle v. Hughes, 1.

RES JUDICATA.

2. A decree declaring void an assessment for a public improvement is not a bar to a subsequent action or suit by the municipality to collect the cost of the work from the property benefited.

Thomas v. Portland, 50.

COLLATERAL ATTACK.

3. The judgment of a court of superior jurisdiction against a nonresident, based on a service of a summons by publication, cannot be collaterally attacked for irregularities or defects in the attachment proceedings connected therewith,

where such proceedings are not by statute made jurisdictional, unless the record affirmatively shows a want of jurisdiction; as, for example, where realty of a nonresident was attached, the summons was served by publication, the defendant appeared specially by a motion to vacate the attachment for certain defects in the return, and the court overruled the motion and entered a judgment for plaintiff, in pursuance of which the land was sold, the judgment is conclusive as to the sufficiency of the attachment in a suit to quiet title between adverse claimants of such land under an execution sale on such judgment and under a deed from the attachment debtor. *Schlusser v. Beemer*, 412.

4. County courts are courts of general jurisdiction when transacting probate business, and their decrees as such cannot be collaterally attacked, except for want of jurisdiction apparent on the face of the record. *Slate's Estate*, 349.

5. While it is true that one cannot properly be punished for disobeying a void order, it is also true that one can and ought to be punished for disobeying a voidable order; for voidable orders are in force until they are set aside in a proper proceeding. *State ex rel. v. Downing*, 309.

LIABILITY OF JOINT TORTFEASORS.

6. In tort actions the parties perpetrating the wrong, agents as well as principals, are jointly and severally liable to the injured party.

Bingham v. Lipman, 363.

See, also, EXECUTION, 7.

JUDICIAL NOTICE. See EVIDENCE, 6, 7, 8.

JURISDICTION

Of Probate Court to Settle Accounts of Deceased Administrators Through Their Personal Representatives. See COURTS, 4.

Of Probate Court to Settle the Accounts of a Removed Guardian on Demand of his Successor. See COURTS, 5.

JURY TRIAL.

Duty to Submit Questions to Jury. ELECTRICITY, 3; RAILROADS, 1, 3.

JUSTICES OF THE PEACE.

JUSTICE'S COURT—APPEAL—WRIT OF REVIEW.

1. Where the remedies by appeal and review are concurrent the initiation of an appeal is not an election of the remedies, but the appeal may be abandoned before being perfected and the other remedy adopted. *Feller v. Feller*, 78.

JURISDICTION OF JUSTICE'S COURT—AMOUNT OF CLAIM.

2. The jurisdiction of a justice's court in Oregon is to be determined by the *ad damnum* clause of the complaint, and not by the amount of the judgment, and if the complaint prays for more than the jurisdictional amount the court is without jurisdiction; and further, where the complaint prays for a sum in excess of the jurisdictional amount, the remission of the excess at the time of trial will not confer jurisdiction. *Ferguson v. Byers*, 468.

LARCENY.

FELONIOUS INTENT NECESSARY.

In larceny it is always necessary to establish the existence of a felonious intent at the time of coming into possession of the stolen property; therefore, a person who obtains possession of the stolen property, and is afterward informed that it has been stolen, but makes no effort to return it, is not guilty of larceny.

Jester v. Lipman, 403.

LAWS OF OREGON. Same as OREGON STATUTES.

LEGISLATIVE POWER. See CONST. LAW, 2.

LEX LOCI. See CONFLICT OF LAWS.

LIMITATION OF ACTIONS.

WHEN TIME BEGINS TO RUN ON STOCK SUBSCRIPTIONS.

1. The statute of limitations begins to run against the right to collect a stock subscription when the stock is payable—and where the subscription is payable by installments, the statute begins to run against each payment separately as it becomes due. *Hawkins v. Donnerberg*, 97.

PLEADING—LIMITATION OF ACTION—DEMURRABILITY OF COMPLAINT.

2. An allegation in a complaint in an action to recover unpaid subscriptions to capital stock of a corporation that there remained due on such subscriptions a stated amount, which was smaller than that for which defendant stockholders were originally liable, is an allegation that payments had been made, but not as to the time of such payments, so that the complaint was not demurrable on the ground that the right of recovery was barred by the statute of limitations; but, under Hill's Ann. Laws, §§ 3, 67, requiring the objection that the action was not commenced within the time limited by statute to be taken by answer, unless such fact appears on the face of the complaint, that defense was available only by answer. *Hawkins v. Donnerberg*, 97.

LIMITATION—EFFECT OF APPEARANCE—RUNNING OF STATUTE.

3. A voluntary appearance by a defendant is equivalent to the commencement of an action in its effect on the running of the statute of limitations.

Hawkins v. Donnerberg, 97.

COMMENCEMENT OF ACTION—RIGHT BY RELATION.

4. Where the complaint in an injunction suit to restrain defendant from occupying certain premises is amended to include a larger tract, the suit will be deemed to have been commenced on the day of the amendment, in determining whether defendant had acquired title by adverse possession to the portion of the tract not included in the original complaint. *Montgomery v. Shaver*, 244.

5. Where a creditor of an insolvent corporation files a creditor's bill against it, another creditor who subsequently makes himself a party, and proves his claim, is entitled by relation to the benefit of the suit as a party plaintiff from the beginning, and the time that elapses from the commencement of the suit to his becoming a party is not to be construed as a part of the time limited for the commencement of an action on his claim. *Dunne v. Portland St. Ry. Co.* 295.

COMMENCEMENT OF ACTION—EFFECT OF APPEARANCE.

6. A suit or action is "commenced" so as to stop the running of the statute of limitations when the defendant enters a general appearance, without reference to the issuance of a summons. *Dunne v. Portland St. Ry. Co.* 295.

LIMITATION—DESCRIPTION OF JUDGMENT IN THE WRIT OF EXECUTION.

7. A decree in divorce dissolved the bonds of matrimony, awarded permanent alimony to the amount of \$20 a month, and \$128 for costs and living expenses *pendente lite*. Subsequently, after considerable alimony was due, an execution was issued in favor of the complainant in divorce, and against defendant, but which failed to show that it was rendered in a divorce suit, and merely recited that plaintiff had obtained a judgment against defendant for \$128, which was enrolled in the clerk's office, etc.; and on motion to recall the execution defendant contended that the execution was void for uncertainty, and hence insufficient to prevent the running of the statute of limitations, under Hill's Ann. Laws, § 295, as amended by Laws, 1893, p. 26, providing that, if no execution issue on a judgment for ten years, it shall be conclusively presumed to have been paid. *Held*, that the contention was without merit, since, the attack being collateral, and it being sufficiently evident that the execution issued on the decree, the deficiency of the execution as to the recital of the amount recovered, etc., would be disregarded. *Brandt v. Brandt*, 477.

LIQUIDATED DAMAGES.

Breach of Bond to Comply with Franchise. See **DAMAGES**, 1.

Agreement for Higher Rate of Interest on Note after Default in. Payment as an Agreement for Liquidated Damages. See **INTEREST**.

LOCAL IMPROVEMENT.

Part Repair—Effect of Remonstrance. See **MUNICIPAL CORPORATIONS**, 19.

LOCAL LAW.

Primary Election Law is Not Local. See **STATUTES**, 1, 2.

Act Changing County Lines is Local. See **STATUTES**, 3.

LOGS AND LOGGING.**CONSTRUCTION OF TIMBER CONTRACT.**

An agreement between the owners of land and another recited that the owners sold the other all the saw timber on the land at a certain price per thousand feet, board measure; all scaling to be done at a mill which the other covenanted to erect on the land. The owners covenanted that they would permit the other to enter on the premises for the purpose of erecting a mill and doing anything necessary during the time allowed to cut and saw the timber. It was provided that no less than a certain amount of lumber should be cut each year, and that it should all be removed within ten years, but that the time might be extended for an additional five years. *Held*, that the contract was not a sale of the saw timber, but a license to erect a mill and manufacture lumber from the saw timber; and hence it was a violation of the agreement for the licensee to remove timber for telegraph poles, though they were scaled at the mill. *Elliott v. Bloyd*, 321.

LOOK AND LISTEN. See **RAILROADS**, 3.

LUMP ASSESSMENT.

Effect of Lumping Land of Various Owners. See **TAXATION**, 1.

MANDATE.

Filing in Costs After Sixty Days. See **COSTS**, 3.

MARRIAGE. See **DIVORCE**.

MARRIED WOMEN.

Will of Single Woman is Revoked by Marriage. See **WILLS**, 14.

Right to Alimony—Effect of Remarrying—Right of Court to Subsequently Modify the Allowance. See **DIVORCE**, 1-5.

MASTER AND SERVANT.**NEGLIGENCE—SAFE PLACE TO WORK.**

1. A sawmill employe was required to clear away the trimmings and sawdust between one of the saws and the wall, four or five feet distant. Over this space, and within less than four feet of the floor, a line shaft revolved at the rate of five hundred revolutions a minute, and at the end of the shaft near the wall was a projecting bolt used in splicing the shaft. In stooping under the shaft at the time in question to remove the trimmings, the employe was caught, whirled around the shaft, and killed. *Held*, that the employers were negligent in leaving the projecting bolt in such a position, as it increased the danger unnecessarily.

Miller v. Inman, 161.

CONTRIBUTORY NEGLIGENCE.

2. A sawmill employe required to work under a revolving shaft was caught on a projecting bolt, whirled around the shaft, and killed. The bolt was not visible when the shaft was in motion, owing to the rapidity of its revolutions, and there was no evidence that he had ever seen the shaft at rest, or knew its condition.

Held, that no contributory negligence was shown, the employe not being required to look out for such defects. *Miller v. Inman*, 161.

UNSEEN ACCIDENT—CAUSE OF INJURY—WEIGHT OF EVIDENCE.

3. A sawmill employe was killed while working under a revolving line shaft. The shaft was in two pieces, joined by couplings held together by bolts and nuts. One of the bolts projected from the nut. No one saw the employe caught in the shaft, but two fellow-employes saw him immediately afterwards, and testified that he was being whirled around the shaft near the coupling, and some of his clothing was found wrapped around the coupling. *Held* sufficient to show that the projecting bolt caused the injury. *Miller v. Inman*, 161.

DUTY OF MASTER TO SERVANT—DELEGATION OF DUTY.

4. It is the duty of a master to exercise reasonable care to provide his servants with reasonably safe places to work, with reasonably competent fellow-workmen, and, in proper cases, to make needful rules for the safe conduct of the business; and the master cannot exempt himself from liability for nonobservance of these duties by delegating them to any servant or employe.

Johnson v. Portland Stone Co. 436.

LIABILITY OF MASTER FOR NEGLIGENCE OF A FELLOW-SERVANT.

5. A recovery cannot be had from the common employer for injuries received, unless it was derelict in its duty in not taking proper precautionary measures for the safety of employes, whereby the injury ensued without the concurrence of plaintiff's acts, or those of fellow-servants.

Wagner v. Portland, 389; *Johnson v. Portland Stone Co.* 436.

WHO ARE FELLOW-SERVANTS.

6. Workmen jointly engaged with plaintiff in removing an electric wire, who were not under any special directions, but were using their judgment as to the manner of the work, are fellow-servants with plaintiff. *Wagner v. Portland*, 389.

IDEM.

7. Persons who work together in a quarry drilling holes for blasts and loading them with powder, and cleaning up after the explosions, and drilling out unexploded holes, are fellow-servants, though one takes the lead and gives directions.

Johnson v. Portland Stone Co. 436.

ASSUMPTION BY SERVANT OF RISK OF EMPLOYMENT.

8. A workman who has worked for two months and a half in taking down electric wires without using rubber gloves, or boards to stand on, knowing the hazards attending the work, will be deemed to have assumed the risk of performing this work without such appliances.

Wagner v. Portland, 389.

KNOWLEDGE BY SERVANT OF HAZARD.

9. A man of mature years, not laboring under any mental disability, engaged in taking down fire alarm wires, who had been warned by a fellow-servant of the danger of being killed while working in proximity to an electric company's wires, and who had heard two fellow-servants say they had received shocks, and had witnessed the effect of electricity on a horse, will not be deemed ignorant of the danger of electricity, and of the hazards of the employment.

Wagner v. Portland, 389.

ASSUMING RISK OF CARELESS FELLOW-SERVANT.

10. A servant who continues to work with a careless or incompetent fellow-servant, knowing him to be so, and without complaint cannot be heard to say the master was negligent in keeping him, for he assumed the chance of injury resulting from such servant's carelessness.

Johnson v. Portland Stone Co. 436.

NECESSITY FOR RULES—ELECTRIC WIRES.

11. When several fellow-servants are taking down electric wires, and not acting under any regulations, the cutting of a wire at the proper place for the convenience of the work and to insure the safety of the employes, is a detail of the

work, which was for the judgment and control of the workmen themselves, and not for the master to regulate by the adoption of rules for their guidance.

Wayner v. Portland, 380.

NECESSITY FOR RULES—DRILLING IN QUARRIES.

12. A master is not negligent in failing to adopt and enforce rules for the conduct of his business, or a particular department of it, unless reasonable care should have foreseen the necessity for them; thus, there is nothing in the business of drilling out the tamping from a hole loaded for a blast which has failed to explode, that calls for the promulgation of rules by the master, the selection of means therefor being a detail depending on the judgment of the workmen.

Johnson v. Portland Stone Co, 436.

MASTER AND SERVANT—PROVIDING RULES.

13. In an action by a workman against his employer for damages from an injury claimed to have been caused by the negligence of the latter, the question whether defendant was negligent in omitting to adopt suitable rules is for the court, in the absence of any evidence showing the necessity and practicability of such rules.

Wagner v. Portland, 380.

MATERIALMAN. Same as MECH. LIENS.

MEASURE OF DAMAGES.

Breach of Contract of Sale of Special Goods. See SALES.

MECHANICS' LIENS.

RETAIL DEALER NOT AN AGENT OF BUILDER.

A retail dealer who sells to a contractor building material that is used in a building is not an agent, contractor, subcontractor, architect, builder, or other person having charge of the construction of a building, within the meaning of Hill's Ann. Laws, § 3660, giving a mechanics' lien for materials furnished to such person; and a manufacturer or wholesaler who furnished such material to the retailer cannot enforce a lien therefor.

Fisher v. Tomlinson, 111.

MEMORANDUM.

Conclusions of Partial Memorandum. See EVIDENCE, 2, 3.

Refreshing Memory—Extracts by Bookkeeper. See WITNESSES, 1.

MENTAL CAPACITY. See WILLS, 1-5.

MINES.

EFFECT OF EXCESSIVE LOCATION.

1. An excessive location of mining ground, made through mistake and in good faith, is void only as to the excess.

Gohres v. Illinois Min. Co, 516.

MINING LOCATION—LOCATING EXCESS.

2. Where a mining location was greatly in excess of the statutory limit, and the locator, on attempting to sell the same, discovered that there was an excess, and procured a third person to locate a certain part of the original tract in his own name for the purpose of making a conveyance, such action was an assertion as to where the excess in the original location lay, so that, on its appearing that the location by such third person was void, a subsequent locator was entitled to claim that portion of the original location as excess.

Gohres v. Illinois Min. Co, 516.

MISCONDUCT OF TRIAL JUDGE.

Improper Comment Before the Jury. See TRIAL, 5.

MONUMENTS. See BOUNDARIES.

MORTGAGES.

ASSUMPTION OF MORTGAGE BY GRANTEE—PERSONAL JUDGMENT.

1. Where a grantee accepts a deed containing a provision that the land is incumbered by a specified mortgage, which is to be paid by him as a part of the price, he thereby assumes the debt, and a personal judgment for the deficiency may be entered against him on foreclosure.

Windle v. Hughes, 1.

ASSIGNABLE COVENANT IN MORTGAGE.

2. Where a mortgagor covenants to pay all taxes on the mortgage and the property, and that if not paid before they are delinquent the mortgagee may pay, and the amounts so paid shall be added to the debt and be secured by the mortgage, such covenant is binding on a grantee of the premises who assumes the payment of the mortgage, and also inures to the benefit of an assignee of the mortgage.

Windle v. Hughes, 1.

EFFECT OF NOTICE OF OUTSTANDING EQUITIES ON MORTGAGEE.

3. A purchase-money mortgagee, who voluntarily releases the mortgage and takes a reconveyance of the mortgaged premises, knowing, or having the means of knowing, that the mortgagor has executed a bond for title therefor, takes the property subject to the equity so created, in the absence of accident, fraud, or mistake; and the holder of such bond may enforce it against all persons knowing of or being chargeable with notice of his claims.

Scott v. Lewis, 37.

MORTGAGE—RECEIVER'S DEBT—PRIORITY.

4. Where, after the execution and recording of mortgages on the property of a hospital corporation, a receiver of the hospital is appointed *ex parte* by an order which does not provide that he may contract debts which shall be a lien on the property, debts contracted by him in the operation of the hospital do not constitute a lien superior to the mortgages.

United States Invest. Corp. v. Portland Hospital, 523.

5. Where a receiver of a hospital appropriated part of the current income to pay a portion of prior mortgages thereon, and also spent therefrom something in improving the property, such payments do not give the contract creditors of the receiver the right to claim a lien on the property superior to such mortgages, in a suit to foreclose them.

United States Invest. Corp. v. Portland Hospital, 523.

MORTGAGE FORECLOSURES—DISPOSAL OF EXCESS OF PROCEEDS.

6. A direction in a mortgage foreclosure proceeding that the excess of the proceeds of the sale of the mortgaged property over the sum necessary to satisfy the mortgage be deposited in court subject to its final order is not reversible error, though Hill's Ann. Laws, § 417, provides that foreclosure sales shall be conducted in the same manner as execution sales; and section 296, subds. 3, 5, direct that the proceeds of an execution sale shall be paid to the clerk, who shall pay to the judgment debtor the excess over the sum necessary to satisfy the judgment.

Close v. Riddle, 502.

MOTIONS.

Motion to Strike Out a Part of a Transcript is Sometimes Considered as a Motion to Affirm. See APPEAL, 9, 10.

Motion for Nonsuit—Effect of on Counterclaim. See TRIAL, 3.

MULTIFARIOUSNESS.

Joinder of Parties Jointly Interested. See PLEADING, 28.

MUNICIPAL CORPORATIONS.

MUNICIPALITIES—FRANCHISE—VALIDITY OF BOND.

1. Under a city charter conferring on the municipality power to "contract for water and lights for city purposes, * * and grant and allow the use of streets and alleys of the city to any person, company or corporation who may desire to establish works for supplying the city and its inhabitants with water or light upon

such terms as the council may prescribe," the council may require the grantee of such a franchise to give a bond conditioned that the terms of the franchise will be complied with. Such bond is not beyond the power of the city to require and accept. *Salem v. Anson*, 339.

CONSTRUCTION OF CITY CHARTER—INTOXICATING LIQUORS.

2. The charter of the City of Ashland, Laws, 1901, p. 287, considered in its entirety, confers on the city council power to regulate the sale of intoxicating liquors, and to require a license therefor, and not merely a power to license and regulate bar-rooms and drinking houses and places where liquor was sold.

Houck v. Ashland, 117.

MUNICIPAL CONTROL OF WHARF RIGHTS.

3. Section 4228 of Hill's Ann. Laws, providing that the corporate authorities of a town wherein it is proposed to erect a wharf or wharves may prescribe the mode and extent to which the franchise may be exercised beyond the line of low-water mark, confers power to regulate the manner of building wharves, and to establish wharf lines, but does not empower a municipality to authorize a riparian owner to extend his wharf in front of the lands of an adjoining riparian owner.

Montgomery v. Shaver, 244.

LEGISLATIVE POWER OVER MUNICIPAL AFFAIRS.

4. No legislature can declare valid that which a competent court has declared invalid, for no independent department of government may interfere with the duties and powers of a co-ordinate branch; so, a legislature cannot annul or set aside the final judgment of a court declaring void an assessment for a public improvement, but, accepting the judicial decree as binding, it can provide for a new assessment that will reach the property holders who did not pay the original assessment.

Thomas v. Portland, 50.

CONSTRUCTION OF ORDINANCE PROHIBITING SALE OF LIQUORS.

5. Ashland City Charter (Laws, 1901, p. 287,) provided that the city council should annually vote on the question as to whether a license should be issued for the sale of intoxicating liquors for the ensuing year, and that, if the majority voted in the negative, no license should be issued during that time. After the time when the first vote had presumably been taken, an ordinance was passed making it a misdemeanor for any person to sell liquor without a license. *Held*, that by its failure to provide a means by which licenses could be obtained, and by the ordinance passed, making it an offense to sell without a license, the city had effectually prohibited the sale of liquor, and no prohibitory ordinance was necessary to prosecute for sales.

Houck v. Ashland, 117.

IDEM.

6. The fact that an ordinance requiring a license for the sale of liquors was not limited to the sale of liquors as a beverage, and did not exempt from its provisions a sale made on a prescription of a licensed physician, which limitations and exceptions were in the charter, did not render the ordinance inoperative as to sales of liquor as a beverage by other than licensed physicians. *Houck v. Ashland*, 117.

CONSTRUCTION OF PARTLY VOID ORDINANCE.

7. An ordinance partly void for lack of power to enact it will be valid so far as it is within the authority conferred on the council, and void so far as it is beyond that authority, where the parts are severable.

Houck v. Ashland, 117.

AGENCY OF BOARD OF FIRE COMMISSIONERS.

8. A board of fire commissioners appointed under a city charter authorizing the mayor to appoint a board of fire commissioners, which board shall have exclusive power and authority to organize and control the fire department, is not an independent body, but its acts are those of the city, for which the latter is liable.

Wagner v. Portland, 389.

LIABILITY OF CITY FOR NEGLIGENCE OF ITS MINISTERIAL OFFICERS.

9. A city engaged in the legal duty of repairing its fire alarm system through private and corporate agencies is acting in its corporate capacity and in the performance of ministerial acts, and is liable for injuries received by a workman therein caused by its negligence. *Wagner v. Portland*, 389.

REMOVALS BY POLICE COMMISSIONER—WRIT OF REVIEW.

10. The question whether a police officer is properly removed by a police commission, when raised by a writ of review, must be determined as a matter of law from the record of the commission, and extrinsic evidence cannot be considered.

Venable v. Police Commissioners, 458.

IMPLIED POWER OF POLICE COMMISSION TO REMOVE OFFICERS.

11. Where a public board, as a municipal police or fire board, is given the power to appoint employes, there goes with it an implied power to remove them, unless there is a limitation elsewhere in the law creating the board.

Venable v. Police Commissioners, 458.

POWER TO REMOVE POLICE OFFICER—CHARTER PROVISIONS.

12. Under a city charter providing for a board of police commissioners who shall perform the executive functions of the city in the organization and management of the police department, and requiring that all appointees on the force shall hold their offices during good behavior, and that no officer shall be removed on political grounds, or for any reason except inefficiency, misconduct, insubordination, or violation of law, after a fair trial, the police commission has the power to reduce the size of the force to keep the expenditures within the estimated revenues, and to summarily remove officers for that purpose, the provisions in reference to trial not applying to such removals.

Venable v. Police Commissioners, 458.

REDUCING POLICE FORCE BY DISMISSALS.

13. The record of a municipal police commission showed that on a certain day the commission proceeded to organize the department by the appointment of fifty-six men on the police force, including plaintiff, which was the only order creating the offices which such appointees should fill. Thereafter the plaintiff and nine other officers were removed; the record reciting that they were dismissed from service, though they had performed their duties, there being no funds for their payment. *Held* that, as the offices filled by such appointees were created merely by their appointment, the later entry showing their dismissal was a reduction of the police force by the abolition of the offices held by such appointees, and was not a mere dismissal of the officers without trial.

Venable v. Police Commissioners, 458.

EVIDENCE OF REMOVAL OF POLICEMEN FOR POLITICAL REASONS.

14. Ten officers were discharged on June 23, which was shortly after a municipal election, the order of discharge reciting that they had performed their duties, but were removed by the commission for want of funds. On June 30 one of the removed officers was appointed special policeman, and on August 2 four others were appointed as members of the force, and on September 2 two others were re-appointed. There were no appointments made in the place of the other officers removed. *Held*, insufficient to show that any of the officers were removed for political reasons.

Venable v. Police Commissioners, 458.

INVALID STREET ASSESSMENTS—CONSTRUCTION OF CURATIVE ACT.

15. Section 156 of the Portland Charter of 1898 (Laws, 1898, pp. 101, 163), providing that, if, on the completion of any street improvement, when the cost thereof is declared by the common council to be a charge on the adjacent property, any assessments levied to defray the cost thereof are adjudged to be invalid, the city may bring actions against the owners of the abutting property on which the cost of such improvement might be charged, and recover the cost of such improvement,

was not intended to nor does it in and of itself cure or confirm defective assessments, but was intended to afford a new remedy for the enforcement of assessments that have been judicially declared void, and only such are affected.

Thomas v. Portland, 50; *Oregon Real Estate Co. v. Portland*, 56.

ACT CURING VOID ASSESSMENTS—DUE PROCESS OF LAW.

16. An act providing that after an assessment for a public improvement has been adjudged void the municipality may maintain an action against the owners of the property assessed, is not a taking of property without due process of law, for the parties affected are allowed a day and time to be heard on the right and manner of assessment.

Thomas v. Portland, 50.

CURING VOID ASSESSMENT—EFFECT OF TRANSFER OF LAND.

17. Such a proceeding against the owners of the property assessed for an improvement is not affected by the fact that the property may have changed hands between the time it was originally assessed and the time of bringing the action.

Thomas v. Portland, 50.

RES JUDICATA.

18. A decree declaring void an assessment for a public improvement is not a bar to a subsequent action or suit by the municipality to collect the cost of the work from the property benefited.

Thomas v. Portland, 50.

STREET REPAIR—EFFECT OF REMONSTRANCE.

19. Where, in an attempt of a city to carry forward the improvement of a portion of a street and the repair of the remainder as a single undertaking, the improvement proceedings are invalid, the portion to be repaired is left to be proceeded with as a separate undertaking; and a remonstrance of the owners of more than one half of the property adjacent to and assessed for the repair, becomes effective, so as to render the proceedings and subsequent assessment void.

Oregon Real Estate Co. v. Portland, 56.

CONSTRUCTION OF BOND TO COMPLY WITH FRANCHISE.

20. Where a city has required from the grantee of a public franchise a bond conditioned that the terms of the grant shall be complied with, and the bond has been tendered and accepted, the sum specified in such bond is substantially a statutory penalty, and, upon a breach of the bond, the entire sum may be recovered, without proof of special injury.

Salem v. Anson, 339.

ACTIONS AGAINST PUBLIC CORPORATIONS.

21. Hill's Ann. Laws, § 350, providing that an action may be maintained against any public corporation in this state, in its corporate character, and within the scope of its authority, for an injury to plaintiff from some act or omission of such public corporation, authorizes an action against a city only when it is liable in its corporate capacity, as distinguished from its political or governmental capacity.

Wagner v. Portland, 389.

MUTUAL ACCOUNT Defined. See COSTS, 1.

NATURALIZATION.

Effect of on Right to Acquire Public Land. See ALIENS.

Effect of on Suit to Cancel Deed From State. See PUB. LANDS, 1.

NAVIGABLE WATERS.

WHARF RIGHTS OF UPLAND OWNERS.

1. Riparian owners on navigable streams are entitled to wharf from their upland out to navigable water, or to the channel, within side lines drawn at right angles with the thread of the stream and intersecting the boundary lines of the land at ordinary high-water mark, and not elsewhere; and the right is not affected at all by the establishment of wharf lines by municipalities.

Montgomery v. Shaver, 244.

MUNICIPAL CONTROL OF WHARF RIGHTS.

2. Section 4228 of Hill's Ann. Laws, providing that the corporate authorities of a town wherein it is proposed to erect a wharf or wharves may prescribe the mode and extent to which the franchise may be exercised beyond the line of low-water mark, confers power to regulate the manner of building wharves, and to establish wharf lines, but does not empower a municipality to authorize a riparian owner to extend his wharf in front of the lands of an adjoining riparian owner.

Montgomery v. Shaver, 244.

NATURE OF WHARF PRIVILEGE.

4. A wharf right is an appurtenance to the upland with which it is connected; it is not a right inseparably attached, however, but may be severed from the upland.

Montgomery v. Shaver, 244.

EFFECT OF ADVERSE HOLDING OF WHARF RIGHT.

5. A wharf right may be lost to the upland owner by prescription, so that a riparian owner erecting and using for ten years a wharf which encroaches on the water front of an adjacent riparian owner, acquires title by adverse possession to the water front so occupied and to the waters extending outward to the ship channel in front of such water front.

Montgomery v. Shaver, 244.

EVIDENCE OF ADVERSE POSSESSION OF WHARF RIGHT.

6. A riparian owner claiming title by adverse possession of the water front of an adjoining riparian owner had driven piling for the purpose of constructing a wharf, but it was never completed. He afterwards authorized the use of a portion of the space as a ferry slip, and it was so used for about six months, and boats were occasionally tied up to the piling. *Held*, not to show an exclusive use sufficient to give title by adverse possession.

Montgomery v. Shaver, 244.

NEGATIVE PREGNANT Evidence. See EVIDENCE, 13.

NEGLIGENCE.

RIGHT TO VERDICT OF JURY IN NEGLIGENCE CASES.

1. Under the Constitution of Oregon, Art. I, § 17, providing that the right of trial by jury in all civil cases shall remain inviolate, the question of negligence must be left to the jury to determine, where the defendant has been put upon the defense, even though there may not be any conflict in the testimony.

Shobert v. May, 68.

LIVE ELECTRIC WIRES—INFERENCE OF NEGLIGENCE.

2. In actions against electric companies for injuries received from contact with live wires in public ways proof of the breaking of the wires and of the happening of the accident makes a *prima facie* case of negligence.

Boyd v. Portland Elec. Co. 126.

RES IPSA LOQUITUR.

3. Where plaintiff has made a *prima facie* case of negligence by showing that an accident happened resulting in his injury, the presumption is that the accident would not have happened had the proper care been taken.

Boyd v. Portland Elec. Co. 126.

See MASTER AND SERVANT; RAILROADS, 1.

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NONSUIT at Trial.

Effect on Counterclaim of Such a Motion. See TRIAL, 3.

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OBLIGATION OF CONTRACTS.

Preference of Unsecured Over Contract Claimants. See CORP. 6.

OFFICERS.

PUBLIC OFFICERS—RIGHT TO FEES.

1. The right of a public officer to compensation must be based on a constitutional or statutory provision, and he can demand only those fees there prescribed.

Baker County v. Benson, 207.

PUBLIC OFFICERS—CHARGES AGAINST STATE OR COUNTY.

2. Public corporations, being instrumentalities of government, are not impliedly under obligation to pay public officers for services rendered to them, there must always be a legal provision for every charge for such services.

Baker County v. Benson, 207.

PUBLIC OFFICERS—SERVICES TO PUBLIC CORPORATIONS.

3. A public officer is not entitled to demand in advance his legal charges for making copies of records for a county.

Baker County v. Benson, 207.

OFFICIAL BONDS—LIABILITY OF SURETIES THEREON.

4. The sureties on the bond of a public officer are not liable for his acts done in a private capacity and in violation of his official duty.

Feller v. Gates, 543.

OFFICIAL FEES.

Right of Public Officers to Fees—Right to Collect in Advance—Charges Against Public Corporations. See OFFICERS, 1, 2, 3.

OPEN ACCOUNT Defined. See COSTS, 1.

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Portland, No. 4223, *Montgomery v. Shaver*, 244.

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Zumalt v. Madden, 23 Or. 185, cited, 540.

OREGON CONSTITUTION. Same as CONSTITUTION OF OREGON.

OVERFLOWED LANDS.

Effect of Acts of 1891 and 1899. See PUBLIC LANDS, 2, 3, 4.

PAROL EVIDENCE. See EVIDENCE, 1, 4.

PARTIES.

REAL PARTY IN INTEREST—TRUSTEE AS PLAINTIFF.

1. A person to whom a bond is executed conditioned to pay all expenses of performing a certain contract is a trustee of an express trust, within the meaning of Section 29, Hill's Ann. Laws, and is therefore the "real party in interest," as a plaintiff is required to be by Section 27 of Hill's Ann. Laws, and may sue on the bond in his own name, without joining the persons who will ultimately receive the benefit of any recovery. *United States v. McCann*, 18.

PRIVITY OF ESTATE BETWEEN DEFENDANTS.

2. Where there is a privity of estate between the parties the owner of real property may sue to restrain threatened or partly accomplished waste thereon.

Elliott v. Bloyd, 328.

JOINDER OF PARTIES AS PLAINTIFFS.

3. Where the owners of different parcels of land contract jointly with another concerning their combined property, such owners may join in a suit to restrain waste on the leased land.

Elliott v. Bloyd, 326.

GUARDIAN'S ACCOUNTS—NECESSARY PARTIES.

4. In a proceeding to settle the accounts of a removed guardian without attempting to surcharge his accounts, but merely to determine whether additional credits should be allowed, the removed guardian is not a necessary party.

Wilson's Guardianship, 858.

PART PERFORMANCE. See STATUTE OF FRAUDS, 2, 3.

PERSONAL INJURIES

To Traveler on Highway at Crossing. See RAILROADS, 1.

To Trespasser on Railroad Track. See RAILROADS, 5.

To Employee by Defective Machinery. See MASTER AND SERVANT, 1-4.

To Traveler in Street by Live Wire. See ELECTRICITY.

PHRASES. Same as WORDS AND PHRASES.

PIERS. Same as WHARVES.

PLEADING.

DUPLICITY IN PLEADING.

1. Duplicity in pleading consists in setting forth and relying upon more than one cause of action. *Bingham v. Lipman*, 463.

FRIVOLOUS PLEADING.

2. A frivolous pleading is one that self-evidently does not raise a cause of action or defense. *Randall v. Simmons*, 554.

SHAM PLEADING.

3. To justify a court in striking out matter from a pleading as sham, under Section 75 of Hill's Ann. Laws, it must be evidently false or pleaded in bad faith. *Randall v. Simmons*, 554.

DISCLAIMER.

4. In a suit to determine adverse claims to realty a denial that defendant claims any right, title, or interest in the premises except as hereinafter stated, followed by an affirmative defense, is not a disclaimer, since the renunciation is only partial, and the affirmative matter is expressly excepted therefrom.

Moore v. Clackamas County, 536.

ACTION FOR FALSE IMPRISONMENT—PLEADING ALL THE FACTS.

5. In an action of damages against several persons for false imprisonment an allegation of conspiracy may be treated as matter in aggravation or explanation, and is not an essential averment, since the recovery may be joint or several.

Bingham v. Lipman, 363.

6. In actions for damages resulting from trespass it is allowable to plead all the circumstances accompanying the act and that constitute a part of the occurrence, so as to show the purpose and extent of the injury.

Bingham v. Lipman, 363.

7. Where plaintiff, who had been in defendants' employ, alleged that defendants unlawfully "conspired" for the purpose of extorting money from her, and that she was induced to enter their office, where she was charged with larceny of articles from their store, and threatened with arrest and disgrace, and that they locked her in the store, and kept her for several hours, and extorted money from her, the complaint was not bad for duplicity, as a series of unlawful acts aimed at and contributing to the injury complained of may be averred, without violating the rule against duplicity.

Bingham v. Lipman, 363.

PLEADING JUDGMENT OF COUNTY COURT IN PROBATE.

8. County courts being of general and superior jurisdiction in probate matters, it will be presumed that they had jurisdiction in given probate cases, and therefore their orders therein, when relied on, may be pleaded in general terms as having been made and entered, under Hill's Ann. Laws, § 86.

Rutenic v. Hamakar, 444.

ACTION ON STOCK SUBSCRIPTION—ALLEGATION OF PAYMENTS.

9. An allegation in a complaint in an action to recover unpaid subscriptions to capital stock of a corporation that there remained due on such subscriptions a stated amount, which was smaller than that for which defendant stockholders were originally liable, is an allegation that payments had been made, but not as to the time of such payments.

Hawkins v. Donnerberg, 97.

COMPLAINT ON ADMINISTRATOR'S BOND—ALLEGING AN ACCOUNTING.

10. A complaint in an action on an administrator's bond averring a hearing before the county court in "a suit for an accounting" brought against the defendant, and stating that a decree was rendered therein finding that he had a certain sum in his possession belonging to the estate, is not demurrable on the ground that the county court cannot entertain a suit for an accounting; the accounting alleged not being an equitable accounting, but the accounting required by statute of an administrator.

Rutenic v. Hamakar, 444.

CHARGING BREACH OF A BOND.

11. A complaint in an action on an administrator's bond which avers that in a suit for an accounting the county court found that he had in his possession a specified sum of money belonging to the estate, which sum he refuses to turn over to the administrator *de bonis non*, in violation of said order, does not declare on the judgment of the county court, but on a breach of the conditions of the bond.

Rutenic v. Hamakar, 444.

IDEM.

12. A complaint in an action on an administrator's bond which avers that after a hearing the county court found that the administrator had in his possession a specified sum belonging to the estate, which sum he refuses to turn over to the administrator *de bonis non*, "in violation of the order of the said county court," sufficiently avers a breach of the bond by a refusal to comply with an order of the county court, it being inferable therefrom that an order to turn over the money was made.

Rutenic v. Hamakar, 444.

ACTION ON A BOND—ALLEGING POSSESSION OF PLAINTIFF'S MONEY.

13. A complaint in an action on an administrator's bond commenced in May, 1899, which avers that defendant was removed as administrator in July, 1896, and that at the hearing on the settlement of his accounts in the county court in September, 1896, it was found that he had a specified sum in his possession belonging to the estate, no part of which has been paid to his successor, sufficiently avers defendant's possession of the fund at the commencement of the action; he having secured the money by virtue of his trust.

Rutenic v. Hamakar, 444.

ACTION ON A BOND—ALLEGING A VIOLATION OF TRUST.

14. A complaint on an administrator's bond averring that an order of the county court removing the defendant required him on demand to turn over to his successor all property or money belonging to the estate, and that plaintiff duly qualified as his successor, and demanded said funds, but that defendant refuses to deliver the same, sufficiently avers a breach of the condition of the bond, which provided that it should be void in case the administrator faithfully performed his trust; otherwise to remain in force.

Rutenic v. Hamakar, 444.

ANSWER—DEFENSE OF STATUTE OF LIMITATIONS.

15. A complaint alleging certain stock subscriptions and sundry payments thereon, but not giving the dates of the payments, is not demurrable on the ground that the right of recovery is barred by the statute of limitations; but under Hill's Ann. Laws, §§ 3, 67, requiring the objection that the action was not commenced within the time limited by statute to be taken by answer, unless such fact appears on the face of the complaint, that defense was available only by answer.

Hawkins v. Donnerberg, 97.

ANSWER—DENIALS ON INFORMATION AND BELIEF.

16. Where a petition for the removal of an administrator charges that the administrator made certain admissions showing disobedience of an order of court, a denial of such statement on information and belief in the answer of the administrator may be stricken out, as a denial on information and belief of matters presumptively within the defendant's knowledge is insufficient.

Mills' Estate, 424.

CONSTRUCTION OF ADMISSION IN ANSWER.

17. An answer in an action on a note, expressly admitting the execution of the note, and pleading payment thereof is a sufficient admission of its execution to dispense with proof thereof.

Creecy v. Joy, 28.

IDEM.

18. Hill's Ann. Laws, § 94, provides that every material allegation of the complaint not denied by the answer shall be taken as true. Plaintiff alleged that he was employed to ship grain for defendant, and sued for commissions. The answer

denied the allegations of the complaint, "except as hereinafter stated;" alleged that plaintiff was employed to ship grain; conceded that a certain sum was due him as commission; and set up a counterclaim. It further averred that "the agreement mentioned * * is the same pretended agreement mentioned in plaintiff's complaint, and the oats * * are the same identical oats referred to in plaintiff's complaint." *Held*, error to grant a nonsuit, plaintiff's claim being admitted by the answer, and evidence in its support being unnecessary.

Davenport v. Dose, 336.

ANSWER—JOINDER OF INCONSISTENT DENIALS AND DEFENSES.

19. The holder of a note brought action on it alleging that it was unpaid, except that interest to a certain date had been paid (which amounted to \$5.00). Part of the defendants denied "that no other payment has been made thereon than five dollars, and deny that there is any sum due from these defendants thereon," and alleged affirmatively that defendants were sureties, and had been relieved from liability by an unauthorized extension of time to the principal, who was the other defendant. *Held*, that the affirmative defense was not so inconsistent with the denial as to authorize the court to strike out the former, the denial that no payment in excess of five dollars had been made being, in effect, an allegation of payment, which defendants could join with the affirmative defense, under Hill's Ann. Laws, § 73, authorizing defendant to join separate defenses.

Randall v. Simmons, 554.

ANSWER—INCONSISTENT DEFENSES.

20. The complaint in an action on a note alleged that it was jointly and severally executed for value by its makers, which was not directly denied by defendants, but they alleged the affirmative defense that plaintiff, knowing that defendants were sureties, relieved them from liability by an unauthorized extension of time to the principal. *Held*, that the tacit admission of the receipt for value for the execution of the note was not so inconsistent with the affirmative defense of suretyship as to authorize the court to strike out the latter.

Randall v. Simmons, 554.

ANSWER—INCONSISTENT DEFENSE—EFFECT OF EXTENDING NOTE.

21. A denial in the answer in an action on a note that there is any sum due on the note from defendants is not so inconsistent with an affirmative defense that the defendants are merely sureties, and have been relieved from liability by an unauthorized extension of time by the principal, as to authorize the court to strike out the affirmative defense, as such denial is compatible with the affirmative defense, because the alleged extension of time would discharge the defendants from all liability.

Randall v. Simmons, 554.

ANSWER—EFFECT OF ON A DEFECTIVE COMPLAINT.

22. The defect in the complaint in alleging only the conclusion that a certain sum is due, instead of stating when the obligation matured, is waived by answering over.

Creedy v. Joy, 28.

IDEM.

23. A defendant who answers over after a demurrer to a counterclaim set up by him has been sustained waives any error that may have been committed thereby.

Rutenic v. Hamakar, 444.

IDEM.

24. An affidavit filed as the basis of a proceeding for a contempt not committed in the presence of the court should show the facts constituting the contempt, that the order that has been disobeyed had been served on the defendant or that he had personal knowledge or notice of it, and that a demand to comply with such order had been made by some person authorized to require such compliance; but the want of some of or all these allegations may be supplied by the answer, in which case the defect is cured.

State ex rel. v. Downing, 309.

REPLY—DEPARTURE.

25. Although the manner of instituting a suit to remove a cloud upon the title to real property and a suit to determine adverse claims thereto is different, it being necessary to set out in the complaint in the former the nature of defendant's claim, whereas in the latter it is only necessary to allege that defendant claims an adverse interest, and call upon him to set it forth, the relief sought in both suits is identical; and hence, in a suit to determine adverse claims, wherein defendant declined to disclose the nature of its claim, complainant's reply, disclosing that the adverse claim complained of was a technical cloud on the title, did not constitute such a departure as would require the suit to be dismissed, but the court, having jurisdiction of the subject-matter, would decree such relief as plaintiff would have been entitled to had the suit been a technical suit to remove a cloud.

Moore v. Clackamas County, 536.

REPLY CONSTRUED WITH THE COMPLAINT.

26. Under Hill's Ann. Laws, § 84, providing that in the construction of a pleading its allegations shall be liberally construed, with a view to substantial justice, if the sufficiency of a pleading has not been challenged by motion or demurrer, but is drawn in question upon the admission of evidence, the allegations of the complaint and reply should be liberally construed *in pari materia* for the purpose of determining the true intent of the pleader.

Patterson v. Patterson, 560.

CONSTRUCTION OF REPLY OF PAYMENT OF NOTE.

27. A reply to a defense of payment of a note by the plaintiff that she purchased it, and paid the balance due thereon, and took an assignment of it, being liberally construed, in the absence of preliminary objections, means that the note was bought and assigned to her, not that she paid it.

Patterson v. Patterson, 560.

JOINDER OF PARTIES—MULTIFARIOUSNESS.

28. Where the owners of different parcels of land contract jointly with another concerning their combined property, such owners may join in a suit to restrain waste on the leased ground.

Elliott v. Bloyd, 328.

PLEAS IN EQUITY—OBJECTION TO JURISDICTION.

29. Under the practice in Oregon, the common-law pleas in equity no longer prevail, and objections to the jurisdiction are presented by other pleadings.

Moore v. Shofner, 488.

EFFECT OF NOT ASKING FULL RELIEF.

30. The failure of a pleader to ask the exact relief or all the relief to which he may be entitled, is not preclusive of any relief that the law affords—as, the fact that a complaint does not contain a demand for interest does not preclude the court from awarding interest thereon, if the facts justify it.

Rutenic v. Hamakar, 444.

AMENDING PLEADINGS BEFORE TRIAL—DISCRETION.

31. Where plaintiff alleged that she was called to her employer's office, and accused of stealing articles from its store, and was arrested and confined for several hours, and compelled by threats and intimidation to admit her guilt and pay money, though she was innocent, permitting the plaintiff to strike out the allegation that she had admitted her guilt, after the issues were made up and the case called for trial, was a matter within the discretion of the court, and its ruling will not be disturbed on appeal, unless the discretion is shown to have been abused.

Jester v. Lipman, 408.

IDEM.

32. Under Section 655 of Hill's Ann. Laws, a contempt proceeding in a case not of public interest should be conducted in the name of the state on the relation of the party interested, but where such a proceeding has not been so entitled, it is discretionary with the trial court, under Section 101 of Hill's Ann. Laws, to allow an amendment before trial changing the title by substituting the State *ex rel.* as plaintiff.

State ex rel. v. Downing, 309.

CONSIDERING PLEADINGS AS AMENDED.

33. Where a party, when certain testimony is objected to, asks leave to amend a pleading to conform to the facts as stated by his witnesses, and the court reserves its ruling but admits the testimony, and decides the point as if the amendment had been allowed, the appellate court will assume that the amendment was in fact allowed and made. *Lazelle v. Miller*, 549.

NECESSITY OF STATING FACTS.

34. The rules of code pleading require parties litigant to state the facts upon which they rely and not to set forth opinions or conclusions.

Moore v. Clackamas County, 536.

CORRESPONDENCE OF ALLEGATIONS AND PROOFS.

35. Parties cannot prosecute or defend legal proceedings except on the grounds stated in their pleadings—thus, in a suit to declare a deed from a husband to his wife void as in fraud of judgment creditors, the defense that the land was a homestead and not subject to sale on execution, cannot be urged unless pleaded.

Sears v. Davis, 286.

IDEM.

36. No error is committed in excluding testimony offered in support of issues not made by the pleadings; nor is it error to exclude part of such testimony after having improperly admitted some.

Haines v. Cadwell, 229.

IDEM.

37. Parties must succeed or fail in legal proceedings as the proofs correspond with or differ from the pleadings, and where the evidence is of a fact different from the one alleged there is a fatal failure of proof; as an example, where plaintiff pleaded a parol agreement, but on the trial admitted the execution and validity of a written contract for the same services, radically different from the alleged oral one, the pleadings and proofs did not correspond, and a nonsuit was properly granted.

McMahan v. Canadian Ry. Co. 148.

STRIKING OUT IMMATERIAL AVERMENTS.

38. Where a petition for the removal of an administrator is based upon the petitioner's claim as a creditor of the estate, and the answer denies that the estate is indebted to petitioner, a further denial that the petitioner has any interest in the estate, or to the proceeds, or in the disposition thereof, is not responsive to any averment of the petition and may be stricken out.

Mill's Estate, 424.

IDEM.

39. Averments of new matter in an answer, not connected with any matter stated in the complaint, are immaterial and should be stricken out on motion; as, where a petition for the removal of an administrator is based on an allowed claim for attorney's services performed for the estate under a prior administrator, and there is no claim for services since the defendant was appointed, an allegation in the answer that petitioner performed no services for the estate or the defendant since the latter was appointed is immaterial, and should be stricken out.

Mill's Estate, 424.

PRESUMPTION AFTER VERDICT.

40. Where no motion or demurrer has been interposed to a pleading, every reasonable inference should be invoked in its support, and every legitimate intendment indulged in its aid, after verdict.

Patterson v. Patterson, 560.

IMMATERIAL VARIANCE BETWEEN PLEADINGS AND PROOFS.

41. There is not a material variance between an allegation of the execution of a joint and several note by certain named persons and proof of the execution of a joint note by said parties and that one of the parties is dead. *Creedy v. Joy*, 28.

IDEM.

42. Where in an action on a note an indorsement was alleged to have been made, and the note delivered, November 20, it was competent to prove that the note was

actually delivered, indorsed in blank, in the previous August, and that on November 20 an indorsement of a waiver of demand and notice of protest was made on the note.

Delsman v. Friedlander, 38.

IDEM.

43. There is not a material variance between an allegation that two makers of a note were severally liable for certain parts thereof, and that each was surety for the other, and proof that the makers were originally liable for the entire sum, but afterward the payee agreed that they should be severally liable for certain parts of the debt, and that each should be liable as surety for the other for the balance, since the real question in both forms of the statement is as to the suretyship.

Lazelle v. Miller, 549.

PLEAS in Equity Are Now Obsolete. See **PLEADING**, 29.

POLICE OFFICERS.

Power of Police Commission to Remove—Reduction of Force by. Dismissals—Evidence of Dismissal for Political Cause. See **MUNIC. CORP.** 11, 14.

POLITICAL RIGHTS of Parties. See **ELECTIONS**, 1.

PORTLAND CHARTER. See **CHARTERS OF CITIES**.

PORTLAND ORDINANCES.

No. 350. *Montgomery v. Shaver*, 244.

POSTPONEMENT. Same as **CONTINUANCE**.

POWER OF COURT.

Direction of Particular Judgment by the Supreme Court. See **COURTS**, 1, 2.

Power to Displace Prior Contract Debts. See **COURTS**, 3.

Requiring Accounting by Former Administrator. See **COURTS**, 4, 5.

PRACTICE IN CIRCUIT COURTS.

Substituting Personal Representative—Notice. See **TRIAL**, 2.

PRACTICE IN SUPREME COURT.

Time Allowed for Filing Cost Bill. See **COSTS**, 2.

Completing Record before Issuing Mandate. See **COSTS**, 3.

Directing the Entry of a Particular Judgment. See **COURTS**, 1, 2.

Abandoning One Appeal and Perfecting Another. See **APPEAL**, 2.

Filing Substituted Bond for a Defective One. See **APPEAL**, 4, 5.

Producing Sureties When Excepted to. See **APPEAL**, 3.

Amending Defective Abstracts of Record. See **APPEAL**, 14.

PREFERENCES.

Advancing Cause on Calendar. See **APPEAL**, 25.

PREMIUMS. See **BUILD. & LOAN ASSOC.**

PRESCRIPTION.

Adverse Holding of Wharf Right—Evidence—Character of Possession Required. See **ADVERSE POSSESSION**.

PRESUMPTION

That Error Was Injurious. See **APPEAL**, 16, 17.

That Instruction Was Based on Evidence. See **APPEAL**, 18.

In favor of Pleadings After Verdict. See **PLEADING**, 40.

PRIMARY ELECTIONS.

Constitutionality and Construction of Lockwood Act. See **ELECTIONS**, 11.

PRINCIPAL AND AGENT.

EVIDENCE OF RATIFICATION OF CONTRACT BY AGENT.

1. Where agents of a railway company, not authorized to make contracts for newspaper advertising, arranged to have advertisements inserted in a newspaper, and to have copies forwarded to the general passenger agent, who had authority to make such contracts, in pursuance of which arrangement the advertisements were inserted, and copies of the publication and monthly statements of account were forwarded to the general passenger agent, there was evidence from which the jury might infer that the agreement was ratified by him.

McMahon v. Canadian Ry. Co. 148.

GENERAL AND SPECIAL AGENCY—LIABILITY OF PRINCIPAL.

2. Where an agent is given full charge of a business, with power to sell and dispose of the stock and replenish it by purchasing new goods, the agency is general, though only for a special business; and a purchase on credit is within the scope of his apparent authority, for which defendant is liable, notwithstanding instructions not to purchase on credit.

Pacific Biscuit Co. v. Dugger, 302.

PRINCIPAL AND SURETY.

DISSOLUTION OF FIRM—ASSUMPTION OF DEBTS.

Where a creditor of a partnership, holding a note jointly executed by the partners, has notice that one partner has assumed the firm debts, he is bound to treat them as principal and surety in his subsequent dealings.

Lazelle v. Miller, 549.

PRIORITY

Between Secured and Unsecured Corporate Creditors. See CORPORATIONS, 6.

PROBATE COURTS.

Power to Settle Accounts Between Representatives of Deceased Administrators. See EXECUTORS AND ADMINISTRATORS, 2.

Collateral Attack on Decrees of. See JUDGTS. 4.

Appointing Administrator—Residence of Deceased. See EXRS. AND ADMRS. 1.

Power to Settle Accounts of a Removed Guardian on Petition of New Guardian. See GUARDIAN AND WARD, 1, 3.

PROMISSORY NOTES. Same as BILLS AND NOTES.

PROTEST.

Need of Consideration For Waiving Protest. See BILLS AND NOTES, 7.

PROVINCE OF COURT AND JURY.

Disputed Questions of Fact. See ELECTRICITY, 3; RAILROADS, 1.

PUBLIC CORPORATIONS.

Actions Against in Public Capacity. See MUN. CORP. 21.

PUBLIC IMPROVEMENTS.

Repair—Improvement—Remonstrance. See MUN. CORP. 19.

PUBLIC LANDS.

SUIT BY STATE TO CANCEL DEED—SUBSEQUENT NATURALIZATION.

1. The naturalization of an alien after a suit has been commenced against him by the sovereign to cancel a deed to certain public land that he had obtained by false affidavits does not perfect his title, such a suit being based on fraud rather than on alienage.

Oregon v. Carlson, 566.

TITLE OF PURCHASERS OF PUBLIC LAND—CURATIVE ACT OF 1899.

2. The act of 1899 validating the title to certain tide lands (Laws, 1899, p. 57, § 1), providing that title to all tide lands originally sold, where the purchaser has in good faith paid the purchase price, should be confirmed, without reference to the

amount or character of other lands theretofore purchased from the state by such purchaser, was intended to confirm the title of those persons only who had previously purchased from the state the maximum amount in other classes of land, and did not confirm the title of one who had previously obtained tide land from the state by fraud. *Oregon v. Carlson*, 566.

CONSTRUCTION OF PUBLIC LAND ACT OF 1890.

3. The title of one who had obtained tide land from the state by fraud was not validated by the public land act of 1890 (Laws, 1890, p. 156, § 9), authorizing the sale of tide lands to citizens of the United States, or to those who have declared their intention to become such, as the statute does not relate to or confirm titles previously granted. *Oregon v. Carlson*, 566.

CONSTITUTIONALITY OF PUBLIC LAND ACT OF 1891.

4. The act of 1891, relating to the sale of tide and swamp lands (Laws, 1891, p. 189, § 2), which provides that applicants to purchase tide lands must be citizens of the United States, is not in conflict with Const. Or. Art. I, § 31, providing that white foreign residents of the state shall enjoy the same rights to the possession, enjoyment, and descent of property as native-born citizens, as there is no constitutional right to purchase state lands, and the state may determine the qualifications of purchasers thereof. *Oregon v. Carlson*, 566.

PUBLIC OFFICERS. Same as OFFICERS.

Punitive Damages in Tort Actions. See TORTS.

QUESTIONS FOR JURY.

In Personal Injury Actions. See ELECTRICITY, 3, 4; RAILROADS, 1, 3.

In General Civil Actions. See TRIAL, 4.

QUIETING TITLE.

TENDERING TAX—APPARENTLY VALID TAX-SALE CERTIFICATES.

1. Where an assessment of land sold for taxes is shown by the complaint to be void, but the certificates of sale are apparently valid on their face, equity will not require the tender of any taxes by plaintiff as a condition precedent to a suit to vacate the tax certificates as a cloud on the title. *Title Trust Co. v. Aylsworth*, 20.

SUIT TO QUIET TITLE—PLEADING POSSESSION.

2. In a suit under Section 504 of Hill's Ann. Laws, as amended by Laws, 1899, p. 227, § 1, providing that any one claiming an interest in realty not in the actual possession of another may maintain a suit in equity against persons claiming adversely to determine their claims, it is necessary to both plead and prove that the land is not in possession of any one. *Moore v. Shofner*, 488.

PLEADING—CONSTRUCTION OF ANSWER.

3. In a suit to determine an adverse claim to realty under Section 504 of Hill's Ann. Laws, as amended (Laws, 1899, p. 227), defendant first filed an answer denying plaintiff's allegation that no one was in possession, asserting actual possession in himself, averring that the court was without jurisdiction, and praying that the suit be abated. This answer was treated as in abatement, and denied by the court, whereupon defendant filed another answer, in which, after repeating the first, he denied plaintiff's title, asserted title in himself and possession for more than ten years, pleaded an estoppel, and again denied the court's jurisdiction. *Held*, that defendant did not waive the objection to the jurisdiction by filing the second answer, the trial thereon being in effect, a retrial as to the jurisdiction on an amended answer; and hence the appellate court must try the case *de novo* on the amended pleadings. *Moore v. Shofner*, 488.

PROOFS IN SUIT TO QUIET TITLE.

4. Unless the plaintiff in a suit to determine an adverse interest to realty proves that the premises are not in the possession of any one, there is no equitable jurisdiction, and the complaint should be dismissed without any attempt to settle questions of title. *Moore v. Shopner*, 488.

VOID TAX-SALE CERTIFICATES AS CLOUDS ON TITLE.

5. A suit in equity may be maintained against a county to remove a cloud upon the title to realty created by tax-sale certificates held by the county, based upon a void assessment, as such suit is not in the nature of a suit to avoid payment of taxes, and in form the suit may be either a technical suit to remove a cloud or one to determine an adverse interest in the land under Section 504 of Hill's Ann. Laws. *Moore v. Clackamas County*, 536.

REMOVING CLOUD—QUIETING TITLE.

6. The distinction between a suit to remove a cloud on a title and a suit to quiet a title or determine an adverse interest is that in the former the pleader should show what the cloud is and why it should be removed, while in the latter it is only necessary to state the rights of the plaintiff and that the defendant claims some interest or estate adverse thereto. *Moore v. Clackamas County*, 536.

NATURE OF SUIT UNDER SECTION 504.

7. The statutory remedy provided by Section 504 of Hill's Ann. Laws is an enlargement of the equitable remedy to remove a cloud, and may be invoked without waiting for possession to be disturbed by legal proceedings; and it also affords efficient relief against instruments and proceedings, such as tax-sale certificates, void on their face, or, if not thus void, where any attempt to enforce them would necessarily reveal their invalidity, whereas without the statute such instruments and proceedings, because of their patent invalidity, would not constitute a cloud. *Moore v. Clackamas County*, 536.

PLEADING—TECHNICALITY—EQUITABLE RELIEF.

8. In a suit to determine adverse claims, wherein defendant declined to disclose the nature of its claim, complainant's reply, disclosing that the adverse claim complained of was a technical cloud on the title, did not constitute such a departure as would require the suit to be dismissed, but the court, having jurisdiction of the subject-matter, would decree such relief as plaintiff would have been entitled to, had the suit been a technical suit to remove such a cloud. *Moore v. Clackamas County*, 536.

RAILROADS.**ACCIDENT AT GRADE CROSSING—QUESTION FOR JURY.**

1. Plaintiff and another, familiar with a railroad crossing, attempted to cross the track with a team and wagon, and were struck by one of defendant's trains. The highway, before crossing the track, ran parallel with and two hundred to three hundred feet from it for half a mile, the view being obscured at intervals. Some forty feet from the crossing the track could not be seen for several hundred feet eastwardly, the direction from which the men were approaching; but from that point the view from the road was obscured until within nineteen feet from the crossing. On approaching the crossing, the men slowed the team to a speed of one and one half miles an hour. Plaintiff testified that the wagon did not make noise enough to interfere with hearing; that at an open place, some forty feet from the track, in looking and listening they stopped their horses so that their movements were almost imperceptible; that, there appearing to be no danger from the east, they looked westwardly, and did not notice the train coming from the east in time to avoid a collision. *Held*, in an action for damages, that the question of contributory negligence was for the jury.

Hecker v. Oregon Railroad Co. 6.

NEGLIGENCE IN MAKE-UP OF TRAIN.

2. It is not negligence *per se* to operate a train in the country districts with the tender ahead of the engine, but the train must be run with reasonable regard to the rights of travelers on the public highways. *Hecker v. Oregon Railroad Co.* 6.

DUTY TO LOOK FOR TRAIN AT CROSSING.

3. An instruction, in an action for injuries received at a crossing, that plaintiff was guilty of contributory negligence if he did not look in each direction at such time and place as would enable him to avoid the approaching train on defendant's track, was properly refused. In this class of cases the jury are ordinarily the judges of whether there was contributory negligence, and the instruction requested would have taken that question from them.

Hecker v. Oregon Railroad Co. 6.

FAILURE TO OBEY RULES AS EVIDENCE OF NEGLIGENCE.

4. A jury may consider the rules of the railroad company requiring a bell to be rung for a distance of a quarter of a mile before reaching a crossing in determining whether such precaution was reasonably necessary, and whether a failure to so ring the bell was negligence on the part of the company.

Hecker v. Oregon Railroad Co. 6.

NEGLIGENCE AS TO TRESPASSER ON RAILROAD TRACK.

5. Deceased, while riding on a hand car with and by invitation of a section foreman, was killed by an irregular train, which came around a sharp curve at a high rate of speed. There was no time to check the train after the car came in sight. The negligence charged was in running such a train around the sharp curve at a dangerous rate of speed without signals or precautions to discover whether there were persons on the track. The foreman, without the knowledge and against the rules of the defendant, had been accustomed to take persons over this piece of road on hand cars. *Held*, that the deceased was a trespasser, and the only duty the railroad company owed him was to exercise reasonable care to avoid injuring him after his presence on the track was discovered.

Rathbone v. Oregon Railroad Co. 225.

RATIFICATION.

What Contracts Can be Ratified—Effect of. See **CONTRACTS**, 2.

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REAL PARTY IN INTEREST.

Trustee of an Express Trust is a Real Party. See **PARTIES**, 1.

RECEIPTS.

Oral Evidence to Explain—Rule For Construing. See **EVIDENCE**, 3.

RECEIVERS.

POSITION OF ONE CONTRACTING WITH A RECEIVER.

1. Persons making contracts with receivers or bidding at receivers' sales thereby subject themselves to the jurisdiction of the court that appointed the receiver, and become entitled to notice and a hearing on matters affecting their rights.

Pacific Lum. Co. v. Prescott, 374.

RIGHT TO ANNUL A RECEIVER'S CONTRACT.

2. When a receiver contracts to sell property, and the buyer, with the assent of the receiver and the approval of the court, assigns the contract to a third person who stipulates to carry out all the terms of such contract, the latter becomes a party to the proceeding in which the receiver was appointed, and subjects himself to the jurisdiction of the court, so as to be bound by an order afterwards rendered annulling the contract.

Pacific Lum. Co. v. Prescott, 374.

RELATIVE RANK OF MORTGAGES AND RECEIVER'S DEBTS.

8. Primarily, a receiver is a specially appointed officer of the court whose duty is to preserve the property involved until the litigation shall be ended, and the expenses incurred in so doing, together with a reasonable compensation, constitute a first charge on the property and its income; but other debts of a receiver will not be preferred to prior contract liens unless such preference is given in the order authorizing the obligation to be incurred or in the order approving and ratifying it.

United States Invest. Corp. v. Portland Hospital, 523.

POWER TO MAKE RECEIVER'S DEBTS A PREFERRED LIEN.

4. In appointing receivers of corporations not *quasi* public in character, or authorizing their receivers to continue the business of such corporations, courts of equity cannot, without the consent of prior lien creditors, decree that the debts of such receivers incurred in carrying on the business of the defendant corporation shall take precedence over prior contract liens.

United States Invest. Corp. v. Portland Hospital, 523.

RECEIVERS—PRIORITY OF RECEIVER'S DEBTS.

5. The fact that a receiver of a private corporation has made an equitable application of part of the income from the property of the defendant does not change the relative rights of any interested party, or give the creditors of the receiver precedence over mortgage creditors of the defendant whose rights had been fixed before the receivership.

United States Invest. Corp. v. Portland Hospital, 523.

REFERENCE.**FINDINGS MUST BE ON MATERIAL ISSUES.**

1. A referee should make findings on all the material issues tendered by the pleadings, and should not make findings on matters not put in issue.

Sutton v. Clarke, 508.

IDEM.

2. In an action to recover the price of saw logs, the answer denied that the price was due, and set up a counterclaim for failure to deliver. *Held*, that the questions of waiver of performance, or of impossibility to perform, not having been pleaded as a defense to the counterclaim, findings of the referee in regard thereto were insufficient to support a judgment for plaintiff.

Sutton v. Clarke, 508.

IDEM.

3. It being the duty of the referee to find on all the material issues made by the pleadings, for his failure to find upon the issues as to whether plaintiff's claim was due, and as to the damages claimed by defendant as a counterclaim, the judgment for plaintiff, based on his findings, should be set aside.

Sutton v. Clarke, 508.

REFRESHING MEMORY of Witness. See **WITNESSES**, 1.

RELATION.

Doctrine of Effect by Relation as of Another Date. See **STATUTES**, 5.

Application of This Doctrine to Beginning Actions. See **LIM. OF ACT.** 4, 5.

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REMOVING CLOUD From Title. Same as **QUIETING TITLE**.

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Effect on Proceeding Already Started. See **STATUTES**, 5.

Effect on Earlier Act Not Mentioned. See **STATUTES**, 6.

Operation of by Implication. See **STATUTES**, 6.

REPLEVIN.

VERDICT IN REPLEVIN.

In a replevin action the verdict must cover all the material issues made by the pleadings or it cannot stand; thus, under allegations of ownership and right to possession, a verdict finding the right to possession but not the right of ownership, will not support a judgment for plaintiff. *Feller v. Feller*, 73.

REPLY. See **PLEADING**, 25, 26, 27.

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RISK OF EMPLOYMENT. See **MASTER AND SERVANT**, 8, 9.

RULES OF COURT.

ADVANCING FOR ARGUMENT.

1. A case involving solely the construction of a will wherein only private persons are interested does not involve any question of "public importance" as that expression is used in Rule 16 of the supreme court, justifying a hearing out of its regular order. *Booth's Will*, 154.

ASCERTAINING COSTS BEFORE ISSUING MANDATE.

2. Rule 22 of the supreme court, providing that, within sixty days after disposition of an appeal or petition for rehearing, a mandate shall issue as of course on the application of either party, does not preclude the clerk, on application being made, from filling in blanks left for the amount of costs and disbursements after the expiration of sixty days. *Richardson v. Orth*, 252.

EXCUSING DEFAULT IN FILING BRIEFS.

3. Sickness of counsel is a sufficient excuse for a short delay in filing a brief, under Rule 6 of the supreme court, the delay not affecting the jurisdiction. *Wagner v. Portland*, 389.

AMENDING ABSTRACT BY ASSIGNING ERRORS.

4. Where an appellant, through a mistake or inadvertence, has failed to print an assignment of errors in his abstract, as required by Rule 9 of the court (35 Or. 587, 588), he may supply the omission if a proper showing is made. *Skinner's Will*, 571.

IDEM.

5. Where a rule of court has become uncertain in meaning by the enactment of statutes since its announcement, parties who have attempted in good faith to comply with the rule should be allowed to amend their papers (as, by adding assignments of error,) so as to prevent injustice or hardship. *Wagner v. Portland*, 389.

APPEAL—COST OF UNNECESSARY MATTER IN TRANSCRIPT.

6. Under Rules 1 and 2 of the supreme court (35 Or. 587, 588), a transcript should contain only the papers specified therein, and where other papers have been copied into the record the charge for such copying should not be allowed in the

cost bill; as, for example, the losing party should not be obliged to pay for the repetition of the title of the case, the repetition of the cost bill, the file marks on the papers, the signatures of officers and attorneys, and such irrelevant matter.

Ferguson v. Byers, 468.

APPEAL—COST OF UNNECESSARY MATTER IN ABSTRACTS.

7. Parties who include unnecessary matter in their abstracts, or who unnecessarily repeat papers, and especially long indorsements and file marks, should not be allowed the expense of printing them, under Rules 4 and 24 (35 Or. 587, 591, 603).

Ferguson v. Byers, 468.

APPEAL—COST OF UNNECESSARY MATTER IN BRIEF.

8. Parties printing briefs in the supreme court should not reproduce the matter required by the rules to be in the abstract, and where they do so the expense thereof should not be allowed as part of the costs.

Ferguson v. Byers, 468.

RULES CONSIDERED IN THIS VOLUME:

Rule 1, *Ferguson v. Byers*, 468.

Rule 2, *Ferguson v. Byers*, 468.

Rule 4, *Ferguson v. Byers*, 468.

Rule 6, *Wagner v. Portland*, 389.

Rule 9, *Skinner's Will*, 571.

Rule 16, *Booth's Will*, 154.

Rule 22, *Richardson v. Orth*, 252.

Rule 24, *Ferguson v. Byers*, 468.

SALES.

BREACH—MEASURE OF DAMAGES.

1. Plaintiff was a sole manufacturer of exhaust steam condensers, but its goods were made for sale in open market, and had a readily ascertainable market value. Defendant wrote for data concerning condensers for engines of a certain size. Plaintiff replied that the specifications given were insufficient, but sent a general price list. Defendant then entered into contracts to furnish condensers to two steamships, and ordered condensers of a certain size from plaintiff, which sent a smaller size. Defendant received these, but refused to accept them as a compliance with its order, and subsequently ordered others of a larger size than any yet specified. When sued for the price of the first condensers defendant tried to offset as damages sundry sums that it had expended in supplying pumps for the steamships. *Held*, that the defendant's set-off for non-compliance with its first order was limited to the difference between the market value of the condensers first ordered and those sent in response, and was not the difference between those so received and those afterwards ordered to fulfill its collateral contracts with the shipowners.

Dean Pump Works v. Astoria Iron Works, 88.

SALE—PAYMENT OF PRIOR DEBT—STATUTE OF FRAUDS.

2. An oral agreement to pay and receive personal property worth more than \$50 in payment of an antecedent debt is within the requirement of the statute of frauds and void.

Milos v. Cuvacevich, 239.

CONSTRUCTION OF A CONTRACT OF SALE.

3. A contract for the sale of a certain quantity of lumber at a stipulated price per thousand provided that if either party breached the contract it should be void, and for the purpose of estimating the amount due in case of partial performance a certain higher rate per thousand was agreed on. The title of the lumber was to vest in the buyer as fast as paid for. *Held*, that though title vested in the buyer as fast as payments were made, and before delivery, it only attached to such a quantity, in case of a breach, as could be secured by the payment of the higher rate agreed on.

Pacific Lum. Co. v. Prescott, 374.

DEFAULT IN COMPLIANCE WITH CONTRACT.

4. A receiver, having contracted to sell a certain quantity of lumber, of different grades, at a uniform price; a higher price to be charged in case of partial perform-

ance and breach; payments to be made at stated intervals,—cited the buyer to show why the contract should not be annulled for nonpayment of an installment, and the court gave him ten days in which to make the payment. *Held*, that the fact that the buyer, before expiration of the ten days, ordered the receiver to deliver the cheaper grade of lumber, which was refused, did not excuse him from his default, and throw the default on the receiver, since, if this were so, the buyer could claim the best quality, as well as the poorest, and secure it at the uniform price, to the extent of the advance payments made by him, despite his default.

Pacific Lum. Co. v. Prescott, 874.

SET-OFF AND COUNTERCLAIM.

EFFECT ON COUNTERCLAIM OF MOTION FOR NONSUIT.

1. A motion to nonsuit for insufficiency of evidence does not amount to an admission by defendant that a counterclaim set up by him is without merit.

Davenport v. Dose, 886.

SET-OFF TO CLAIM DUE AN ESTATE.

2. In an action by an administrator of an insolvent estate to recover a sum claimed by the estate, the defendant cannot set off a claim due from the deceased or his estate, for he would thereby obtain a preference over other creditors—though perhaps the rule may be otherwise when the estate is solvent.

Rutenic v. Hamakar, 444.

SHAM PLEADING Defined. See PLEADING, 3.

SHAREHOLDERS.

When Installment Stock Subscriptions Are Payable. See CORP. 1.

Limitations of Time For Suit by Creditors. See CORP. 2.

SHERIFFS AND CONSTABLES.

LIABILITY ON OFFICIAL BONDS FOR VIOLATION OF DUTY.

The act of a constable in receiving money from an execution debtor under a contract not to serve an execution against the debtor, and to repay the money if the judgment should be reversed on an appeal, being beyond his powers and a violation of his duty, the sureties on his official bond are not liable to the execution debtor for his conversion of the money.

Feller v. Gates, 548.

SHERIFF'S JURY.

Effect of Withdrawing Written Claim From. See ATTACH. 3.

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Stenographic Report of a Trial is not a Bill of Exceptions,—Effect of Attaching to The Transcript. See APPEAL, 6, 7.

SPECIAL ACT.

Primary Election Law of 1901 Not a Special Law. See STATUTES, 1, 2.

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SPECIAL PRIVILEGES AND IMMUNITIES.

Primary Election Law of 1901 Does Not Grant. See CONST. LAW, 8, 9.

SPECIFIC PERFORMANCE.

REQUISITES OF CONTRACT TO DEVISE—SPECIFIC PERFORMANCE.

1. In cases to enforce specific performances of an agreement to will property the evidence must show the contract to be definite, mutual, and founded upon an adequate consideration, and the proof must be clear and convincing.

Richardson v. Orth, 252.

CONTRACT TO DEVISE—SUFFICIENCY OF EVIDENCE.

2. The evidence in this case lacks the convincing quality that is necessary to establish a contract to devise property. *Richardson v. Orth*, 252.

CONTRACT TO DEVISE—SUFFICIENCY OF CONSIDERATION.

3. An agreement whereby decedent was to will her estate (which amounted to about \$4,000) to her stepdaughter, in consideration that the latter would live with decedent and her husband and care for the husband during his illness, is not supported by sufficient consideration to warrant specific performance, where the daughter actually cared for her father only a month, when she was relieved from her duties by his removal to other quarters, and she continued her regular occupation during the entire period. *Richardson v. Orth*, 252.

SUFFICIENCY OF EVIDENCE.

4. The evidence in this case seems to show that a deceased aunt intended to give her nephew part of her farm, but neglected to do so before her death—it does not satisfactorily show that the transfer was to be in settlement of any debt.

Stone v. Ladd, 606.

STATE CONSTITUTION. Same as OREGON CONSTITUTION.

STATE LANDS. Same as PUBLIC LANDS.

STATUTE OF FRAUDS.**SALE—PAYMENT OF PRIOR DEBT—STATUTE OF FRAUDS.**

1. An oral agreement to pay and receive personal property worth more than fifty dollars in payment of an antecedent debt is within the requirement of the statute of frauds and void. *Milos v. Covacevich*, 239.

IDEM.

2. It was agreed that defendant's debt should be liquidated by the transfer of certain property to plaintiff, including a fish net of the value of over \$50. Subsequently plaintiff gave defendant a receipt reciting the transfer of certain property, not including the fish net, and providing that the transfer was in full payment of all claims. *Held*, that the giving of the receipt was not a payment, so as to take the parol agreement for the sale of the fish net out of the statute of frauds. *Milos v. Covacevich*, 239.

CONTRACT TO DEVISE—STATUTE OF FRAUDS—PART PERFORMANCE.

3. A parol agreement whereby decedent was to will her estate to her stepdaughter in consideration that the latter would live with the mother and her husband and would care for the husband during his illness, is not taken out of the statute of frauds by part performance by the daughter, where it appeared that she cared for her father for only a month, and that she continued her regular occupation during the entire time. *Richardson v. Orth*, 252.

STATUTE OF LIMITATIONS. Same as LIM. OF ACTIONS.

STATUTES AND STATUTORY CONSTRUCTION.**SPECIAL AND LOCAL ELECTION LAW.**

1. The act of 1901, p. 317, providing a method of holding primary elections in cities of a certain class is not a special or local law because it provides for the punishment of offenses arising out of the violation of its provisions, since that is merely an incident to the act. *Ladd v. Holmes*, 167.

IDEM.

2. The primary election law of 1901, commonly known as the Lockwood Act (Laws, 1901, p. 317), providing a method of holding primary elections in cities having a population of ten thousand or more, "as shown by the last state or federal census," though applicable to but one city at the time of its enactment, extends to all cities as they subsequently acquire the prescribed population, as the context shows that the act was not intended to apply to only cities that had ten thousand people at the time of the last preceding census, and it is therefore neither special nor local. *Ladd v. Holmes*, 167.

SPECIAL AND LOCAL LAW CHANGING COUNTY LINES.

3. An act annexing a part of one county to another county, such as Laws, 1901, p. 435, adding to Baker County a part of Union County, is both local and special, within the meaning of the Const. Or. Art. I, § 21, stating the conditions on which certain "local and special laws" may take effect. *Baker County v. Benson*, 207.

TITLE OF ACT.

4. Section 25 of Laws, 1901, p. 327, requiring the appointment of a county managing committee and defining its duties, is germane to and connected with the subject of the act—"to provide for primary elections in cities * * and providing the manner of conducting the same," * * —and hence the law is within the purview of Const. Or. Art. IV, § 20, requiring that every act shall embrace but one subject and matters properly connected therewith, which subject shall be expressed in the title. *Ladd v. Holmes*, 167.

REPEAL—EFFECT ON PROCEEDINGS ALREADY INITIATED.

5. Ordinarily the repeal of a statute does not affect proceedings that have been initiated under it, as they will, under the doctrine of relation, be considered as having been done at the time they were commenced. *Windle v. Hughes*, 1.

REPEAL BY IMPLICATION.

6. A subsequent act, not covering the entire ground of an earlier act, and not clearly intended as a substitute for it, does not repeal such earlier act, unless its provisions are so repugnant to it that both cannot stand; thus, Section 3072, Hill's Ann. Laws, relating to wills, has not been impliedly repealed by section 780, nor by section 2992, nor by section 2998, nor by them all in conjunction. *Booth's Will*, 154.

ASSESSMENT OF DAMAGES BY THE COURT—STATUTES.

7. Under Hill's Ann. Laws, § 249, subds. 1 and 2, providing that, in an action sounding in tort, when the defendant has failed to answer, the court shall assess the damages (which is by Section 404 made applicable to suits in equity), it is the duty of the court to assess the damages after taking testimony, even though the defendant has answered without denying the allegation as to the amount of damages. *Gohres v. Illinois Min. Co.* 516.

See WILLS—MUNICIPAL CORPORATIONS—EXECUTIONS—EXECUTORS AND ADMINISTRATORS — COUNTIES — ELECTIONS — CONSTITUTIONAL LAW — PUBLIC LANDS.

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SWAMP LANDS. Same as PUBLIC LANDS.**TAXATION.****VALIDITY OF LUMP ASSESSMENT.**

1. Under Hill's Ann. Laws, § 2770, providing that the assessor, in making up the tax roll, shall place in separate columns the names of persons taxable, a description of each tract to be taxed, the number of acres, and the full cash value of each tract, an assessment including land of another with that of the one sought to be charged, is absolutely void and of no effect for any purpose, even though the lands are assessed at an equal value per acre. *Title Trust Co. v. Aylsworth*, 20.

TENDER OF PENALTY WHEN ASSESSMENT IS VOID.

2. Where an assessment of property for taxation is entirely void the owner is not obliged to tender any sum for the benefit of the holder of a tax title based on such assessment, before being heard to contest such title, as required by Section 2823 of Hill's Ann. Laws. *Title Trust Co. v. Aylsworth*, 20.

REMOVING CLOUD—TENDER OF TAX—VOID ASSESSMENT.

3. Where an assessment of land sold for taxes is void, but the certificates of sale are apparently valid on their face, equity will not require the tender of any taxes by plaintiff as a condition precedent to a suit to vacate the tax certificates as a cloud on the title. *Title Trust Co. v. Aylsworth*, 20.

REPEAL OF LAW—TAXES ALREADY LEVIED.

4. The repeal of a law (*i. e.*, the mortgage tax act), does not usually affect the duty of paying or collecting taxes levied under the law before its repeal.

Windle v. Hughes, 1

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TORTS.

PUNITIVE DAMAGES IN TORT ACTIONS.

1. In actions for tort punitive damages may be allowed under proper circumstances. *Bingham v. Lipman*, 363.

TORT BY CORPORATION—LIABILITY FOR ACTS OF OFFICERS.

2. Where the officers of a corporation, who exercise the whole executive power, participate in and direct all that is done in the commission of a tort, their malicious, wanton, or oppressive intent may be treated as the intent of the corporation, and it may be compelled to respond to punitive damages.

Bingham v. Lipman, 363.

LIABILITY OF TORTFEASORS.

3. In an action of tort against a corporation and its managing agents, on whose conduct its liability depended, a verdict against the corporation only is not void, since the defendants are jointly or severally liable. *Bingham v. Lipman*, 363.

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TRESPASS.

PLEADING—DAMAGES FOR TRESPASS.

In actions for damages resulting from trespass it is allowable to plead all the circumstances accompanying the act and that constitute a part of the occurrence, so as to show the purpose and extent of the injury. *Bingham v. Lipman*, 363.

TRESPASSER.

Duty to Trespasser on Track. See RAILROADS, 5.

TRIAL.

CONSTITUTIONAL RIGHT TO A VERDICT BY THE JURY.

1. Wherever a defendant has been put to proof of his defense in a negligence case, the plaintiff is entitled to have the jury render a verdict upon a consideration of the evidence, and the judge should not direct a verdict in such a case, even though there should be no conflict in the testimony. *Shoberl v. May*, 68.

SUBSTITUTION OF PERSONAL REPRESENTATIVE—NOTICE.

2. Unless specially required by a statute or a rule of court notice need not be given of a motion to substitute a personal representative for a deceased party to a pending cause. See Sections 38 and 524 of Hill's Ann. Laws. *Skinner's Will*, 571.

EFFECT OF COUNTERCLAIM ON MOTION FOR NONSUIT.

3. A motion to nonsuit for insufficiency of evidence does not amount to an admission by defendant that a counterclaim set up by him is without merit.

Davenport v. Dose, 336.

NEGLIGENCE—QUESTION FOR JURY.

4. In an action against an electric company for injuries received from contact with a live wire, where plaintiff has made a *prima facie* case, and defendant has introduced evidence that the accident occurred without fault on its part, the question of negligence is for the jury. *Boyd v. Portland Electric Co.* 126.

REMARKS OF COURT—HARMLESS ERROR.

5. In passing on the various matters necessarily incident to a trial a judge must make remarks in the presence of the jury that are not intended for their guidance, but the instructions are ordinarily sufficient to correct any impressions thus created. *Boyd v. Portland Electric Co.* 126.

REFUSING DUPLICATE INSTRUCTIONS.

6. Requested instructions that are fairly covered by the general charge are properly refused. *Boyd v. Portland Electric Co.* 126.

INSTRUCTIONS ON MATTERS NOT IN ISSUE.

7. Juries must not be instructed on issues not found in the pleadings, and to do so is reversible error. *Carson v. Lauer*, 269.

INSTRUCTIONS MUST BE REASONABLY CONSTRUED.

8. The instructions to a jury must be reasonably construed in the light of the evidence that has been received, and the two should be considered together; as, where the evidence showed that the chief executive officials of a corporation either did or authorized all the acts constituting a tort, instructions regarding the liability of the corporation for punitive damages must be interpreted accordingly, and are not to be deemed erroneous because they may be broad enough to make the corporation liable in such damages for the acts of any of its officials, regardless of rank. *Bingham v. Lipman*, 363.

PRESENTING THEORIES OF THE RESPECTIVE PARTIES.

9. Parties are entitled to have their respective theories of a case fairly presented to the jury, but the manner of presentation rests with the judge, and if he chooses to set forth certain opposing claims in close association it is his privilege to do so. *Bingham v. Lipman*, 363.

INSTRUCTION LIMITING APPLICABILITY OF EVIDENCE.

10. Where testimony is admitted that is claimed to be incompetent as against some of several parties, the objectors should ask an instruction limiting its applicability. *Bingham v. Lipman*, 363.

CONSTRUCTION OF PLEADINGS AND FINDINGS.

11. An answer in an action on a note alleged that it was made by the president and secretary of defendant corporation as a renewal note to take up one pre-

viously given to plaintiff's assignor in payment of their personal indebtedness arising out of the purchase of a patent right, which was not within defendant's objects and purposes; that defendant's board of directors never authorized or ratified the execution of either of said notes; that defendant received no benefit therefrom; and that plaintiff took the notes with knowledge of these defenses. *Held*, that a finding that the defendant's president and secretary had authority to execute and deliver the note covered the material issue presented.

Reade v. Pacific Supply Assoc. 60.

NECESSITY OF FINDINGS ON INTERMEDIATE MATTERS.

12. It is sometimes necessary to pass on several subordinate and intermediate facts in reaching a conclusion as to an ultimate fact, but ordinarily it will be sufficient to make a finding on the latter, if further findings are wanted they should be asked for. This is, of course, subject to the rule that findings are imperatively necessary on all material issues. *Reade v. Pacific Supply Assoc.* 60.

IMMATERIAL FINDINGS—HARMLESS ERROR.

18. In an action on a note against a corporation, a finding that the president, one of the persons who executed the note, was the owner of the majority of the stock of the corporation, though outside the issues, is not prejudicial to the defendant, where the judgment is supported by proper findings.

Reade v. Pacific Supply Assoc. 60.

CONSTRUCTION OF FINDINGS.

14. Where the pleadings in an action on a note admit that the persons who executed it were the defendant corporation's president and secretary, and that they signed the note as such, a finding that they had authority therefor is not a conclusion of law as to what they might do under the power delegated, but a finding of the fact of their authority.

Reade v. Pacific Supply Assoc. 60.

TRUSTS AND TRUSTEES.

RIGHT OF TRUSTEE TO SUE IN HIS OWN NAME.

Under Section 29 of Hill's Ann. Laws a trustee to whom a bond has been executed for the benefit of another may sue thereon in his own name only.

United States v. McCann, 13.

UNDERTAKING.

Filing New Undertakings on Appeal. See APPEAL, 4, 5.

UNITED STATES CONSTITUTION.

Amendment 5, *Thomas v. Portland*, 55, (in footnote).

USURY.

EXCESSIVE INTEREST UNDER OTHER NAMES.

A contract by a borrower from a loan company under which he purchases a stated amount of stock in the company, at once assigns half of his purchase to the company absolutely, as a premium for the loan, and then pays the monthly assessments on his entire subscription, together with six per cent interest on the amount borrowed, is usurious, since the interest and monthly assessments combined amount to more than ten per cent on the loan, and no higher rate than ten per cent can be directly or indirectly paid for the use of money in this state.

Pacific Building Co. v. Hill, 280.

VARIANCE. See PLEADING, 37, 41, 42, 43.

VENDOR AND PURCHASER.

RIGHT OF VENDEE—HOLDER OF BOND FOR TITLE.

A purchase-money mortgagee, who voluntarily releases the mortgage and takes a reconveyance of the mortgaged premises, knowing, or having the means of knowing, that the mortgagor has executed a bond for title therefor, takes the

property subject to the equity so created, in the absence of accident, fraud, or mistake; and the holder of such a bond may enforce it against all persons knowing or being chargeable with notice of his claim. *Scott v. Lewis*, 87.

VERDICT.

Required Form of in Replevin Actions. See REPLEVIN.

VOID AND VOIDABLE ORDERS.

Force and Effect of Void Orders—Rule as to Voidable Orders—Contempt in Disobeying Such Orders. See CONTEMPT, 4, 5.

VOLUNTARY APPEARANCE.

Effect of Appearance on Running of Statute. See APPEARANCE, 1, 2.

WAIVER.

Defective Complaint—Effect of Answering Over. See PLEADING, 22, 23, 24.

WAREHOUSEMEN.

WAREHOUSE RECEIPTS AS REPRESENTATIVES OF PROPERTY.

1. Where, under Hill's Ann. Laws, § 4201, *et seq.*, a warehouseman receives any commodity in store, and issues the prescribed receipt therefor, such receipt represents the property, and a transfer thereof leaves no attachable interest in the depositor. *Adamson v. Frazier*, 273.

ATTACHMENT OF GOODS IN WAREHOUSE—ANSWER OF GARNISHEE.

2. An answer by a warehouseman garnishee that he has in his care certain property stored by the defendant in the writ, for which he has issued negotiable warehouse receipts, is not a statement that such property still belongs to the person who stored it, and if the property is afterward claimed by genuine transferees of the warehouse receipts, the garnishee will not be liable on his answer, even though the case has proceeded to judgment, and an order has been entered directing the sale of the attached property described in his answer. *Adamson v. Frazier*, 273.

WASTE. See INJUNCTION.

WATERS.

BANKS OF STREAMS—CUTTING NATURAL DEPRESSIONS.

1. Where there is a natural depression in a river bank, with a well-defined channel leading therefrom through which the water is accustomed to flow during the irrigating season, thereby rendering the plaintiff's lands highly productive, the waters flowing through such channel partake of the nature of a natural stream to such extent that defendant cannot, by damming up such outlet, divert such water to plaintiff's injury. *Mace v. Mace*, 386.

CONTROL OF ARTIFICIAL WORKS.

2. When plaintiff's rights as to a stream are only those of a riparian proprietor, and are not based on contract or usage, the court cannot decree the maintenance and regulation of artificial works constructed by defendant, but only the restoration and maintenance of the natural condition. *Mace v. Mace*, 386.

WHARVES.

NAVIGABLE WATERS—WHARF RIGHTS.

1. Riparian owners on navigable streams are entitled to wharf from their upland out to navigable water, or to the channel, within side lines drawn at right angles with the thread of the stream and intersecting the boundary lines of the land at ordinary high-water mark, and not elsewhere; and the right is not affected at all by the establishment of wharf lines by municipalities. *Montgomery v. Shaver*, 244.

MUNICIPAL CONTROL OF WHARF RIGHTS.

2. Section 4228 of Hill's Ann. Laws confers power to regulate the manner of building wharves, and to establish wharf lines, but does not empower a municipality to authorize a riparian owner to extend his wharf in front of the lands of an adjoining riparian owner.

Montgomery v. Shaver, 244.

NATURE OF WHARF PRIVILEGE.

3. A wharf right is an appurtenance to the upland with which it is connected; it is not a right inseparably attached, however, but may be severed from the upland.

Montgomery v. Shaver, 244.

EFFECT OF ADVERSE HOLDING OF WHARF RIGHT.

4. A wharf right may be lost to the upland owner by prescription, so that a riparian owner erecting and using for ten years a wharf which encroaches on the water front of an adjacent riparian owner, acquires title by adverse possession of the water front so occupied and to the waters extending outward to the ship channel in front of the water front so occupied.

Montgomery v. Shaver, 244.

WILLS.

TESTAMENTARY CAPACITY.

1. If a testator, when executing his will, understands what he is doing, knows what he has to dispose of and how he wishes to distribute it, he has testamentary capacity, though he may be very old and sick, and extremely debilitated and distressed.

Ames' Will, 495.

IDEM.

2. The fact that a person over seventy years old, who had been for many years a believer in the Mormon faith, was in failing health for some time prior to the making of his will, and sometimes talked to the picture of the founder of his church, believing that this deceased person possessed the "keys of the kingdom," and could hear and understand what was said to him, and sometimes cracked his fists together when excited, does not show testamentary incapacity.

Ames' Will, 495.

3. The appointment of a guardian for a person who is alleged to be mentally incompetent is presumptive evidence that the person under guardianship is not of sound mind and memory, but it is not conclusive by any means.

Ames' Will, 495.

4. A testator, when executing his will, was impaired in health and confined to his room, but able to dress himself and go to his meals. On the death of the chief beneficiary under a former will, he discussed with his neighbors and his lawyer the advisability of making another, and sent for the latter to draw a new will. The testator had made memoranda of several gifts, and discussed with the lawyer in detail the proposed gifts, giving intelligent reasons for the provisions he desired. The lawyer was of the opinion that he possessed testamentary capacity. He intelligently transacted other business at the time of making the will. His neighbors, intimate acquaintances, testified that the testator was peculiar, but transacted his own business and exhibited a singular shrewdness which was characteristic of him. Contestant's witnesses believed him incompetent to dispose of his property, but related particular transactions which gave indications of his good sense. On two or three occasions the testator had aimlessly wandered about in a dazed condition, but these were of short duration, and apparently caused by temporary physical ailments. A codicil to the will was executed under similar circumstances, except that he had grown physically weaker. Held, on a contest of the will and codicil, that the evidence did not show testamentary incapacity.

Skinner's Will, 571.

INSANE DELUSION EXPLAINED.

5. Where a testator, believing and acting upon neighborhood gossip, thought that his daughter-in-law would take measures to possess herself of his property, he was not possessed of an insane delusion which would invalidate his will, since the idea had its basis in an external fact, viz., the statements made by others, although they were untrue. *Skinner's Will, 571.*

REQUISITES OF CONTRACT TO DEVISE.

6. In cases to enforce specific performance of an agreement to will property the evidence must show the contract to be definite, mutual, and founded upon an adequate consideration, and the proof must be clear and convincing.

Richardson v. Orth, 252.

CONTRACT TO DEVISE—SUFFICIENCY OF CONSIDERATION.

7. An agreement whereby decedent was to will her estate (which amounted to about \$4,000) to her stepdaughter, in consideration that the latter would live with decedent and her husband and care for the husband during his illness, is not supported by sufficient consideration to warrant specific performance, where the daughter actually cared for her father only a month, when she was relieved from her duties by his removal to other quarters, and she continued her regular occupation during the entire period.

Richardson v. Orth, 252.

NECESSITY OF REQUESTING WITNESS TO SIGN.

8. A person who has seen a testator sign a will and then signs as a witness, thereto, signs "at the request" of the testator, if the latter understands what is being done and apparently assents thereto. Where an attorney, having drawn up a will, proposed to testator that he and his stenographer would witness it, if satisfactory, and thereupon called her from an adjoining room into the office where they both signed it in testator's presence, and without objection from him, there was a sufficient attestation, though testator did not personally request the stenographer to witness the will, and may not have heard the attorney when he invited her to do so.

Ames' Will, 495.

MANNER OF REQUESTING WITNESS TO SIGN.

9. Where an attorney drawing a will called a person to witness its execution, who signed as a witness, the assumption is warranted that this was done at testator's instance; the attesting clause reciting that the witness signed at the request of the testator, and there being no direct denial that such was the case.

Skinner's Will, 571.

WILL—SUFFICIENCY OF ATTESTATION.

10. The signature at the end of a purported will by witnesses will not constitute a sufficient attestation thereof when the testatrix does not indicate to them in any way what the paper is, or acknowledge that she has signed it, or that it was intended to be executed by her, the paper being so folded that the witnesses could not see any of the writing.

Richardson v. Orth, 252.

EVIDENCE OF EXECUTION OF WILL.

11. The evidence of the execution of a will and codicil showed the signature of the testator and the subscribing witnesses. One of the witnesses testified that they attested the will and codicil in the presence of the testator. The other witness did not remember that the testator had signed the will, or that he saw the witness attest it, or that he requested witness to sign. The latter witness, at the first probate of the will, signed the usual affidavit required for making proof in common form, deposing that she saw the testator subscribe the will and codicil and that she signed as a witness at his request and in his presence. The will and codicil contained the usual attestation clause. *Held*, that there was sufficient proof of the execution; if the fact of execution is not clearly proven, it is so nearly so that the balance of necessary evidence is supplied by the presumption that the legal formalities were complied with.

Skinner's Will, 571.

NECESSITY OF PUBLISHING THE PAPER AS A WILL.

12. Under Hill's Ann. Laws, § 8069, prescribing that a will or codicil shall be in writing, signed by the testator and attested by two competent witnesses subscribing their names in the presence of the testator, a will executed in proper form is valid without any publication or any statement by the testator that it is his will or codicil; it being only necessary to observe the formalities required by the statute.

Skinner's Will, 571.

UNDUE INFLUENCE.

13. Whatever undue influence may have been exerted over the testator whose will is here contested was not until after the will had been executed, and so could not have influenced its terms.

Ames' Will, 495.

REVOCATION OF A WOMAN'S WILL BY SUBSEQUENT MARRIAGE.

14. Section 8072, Hill's Ann. Laws, providing that the will of an unmarried woman shall be deemed revoked by her subsequent marriage, has not been impliedly repealed by Section 780, Hill's Ann. Laws, declaring that a written will cannot be revoked otherwise than by another written will, or canceled or destroyed by the testator himself or by another person in his presence, the latter section having reference only to revocation by some direct act of the testator; nor by section 2992, removing the common-law disabilities of married women, and vesting them with complete control of their property as though unmarried; nor by section 2998, declaring that all laws which impose or recognize civil disabilities in a wife not imposed or recognized as existing as to the husband are thereby repealed; and section 8072 is still in force.

Booth's Will, 154.

WILL AS A CONTRACT.

15. A writing reciting that the maker, being in sound mind, "declares this to be my last will; that is, * * I give J. the rest of my property," does not constitute a contract between the parties, no obligation being assumed by either, and may be revoked by the maker.

Richardson v. Orth, 252.

WITNESSES.**WITNESS REFRESHING MEMORY BY MEMORANDUM.**

1. In an action by a banker to recover advances made to defendants, a clerk who kept the bank books, and knew them to be correct, may refresh his memory, while testifying, by consulting memoranda copied from the books, and carefully compared by him, if, after so using it, he is enabled to testify from memory of the original transactions.

Haines v. Cadwell, 229.

QUALIFICATION OF WITNESS ON EXPERT SUBJECT.

2. Before a witness should be permitted to testify on a matter requiring expert knowledge he should be shown to be skilled touching the subject of inquiry.

Wagner v. Portland, 389.

WRIT OF REVIEW.**JUSTICE'S COURT—APPEAL—WRIT OF REVIEW.**

1. Where the remedies by appeal and review are concurrent, the initiation of an appeal is not an election of the remedies, but the appeal may be abandoned before being perfected and the other remedy adopted.

Feller v. Feller, 73.

NATURE OF QUESTIONS TO BE SETTLED BY WRIT OF REVIEW.

2. On a writ of review only law questions arising on the record can be determined—no testimony can be received.

Venable v. Police Comrs. 458.

SUFFICIENCY OF PETITION FOR WRIT OF REVIEW.

3. Under a statute such as Hill's Ann. Laws, § 584, which requires a petition for a writ to review the decision of an inferior tribunal to describe with convenient certainty the judgment to be reviewed, and to set forth the alleged errors, and section 585, which provides that the writ shall issue when the inferior court appears to have exercised its functions erroneously, or to have exceeded its jurisdic-

tion to the injury of some substantial right of the petitioner, it is not necessary that the petition should set forth distinctly that the petitioner has been injured, since that is a mere conclusion from the statement of the particulars in which the lower court erred. *Ferguson v. Byers*, 468.

WORDS AND PHRASES.

CLAIMANT AGAINST AN ESTATE.

A residuary legatee is not a "claimant" against an estate within the meaning of Section 1131, Hill's Ann. Laws. *Conser's Estate*, 138.

EQUAL ELECTIONS.

The word "equal" in Const. Or. Art. II, § 1, providing that "all elections shall be free and equal," means that every qualified elector is entitled to have his vote counted as cast, and to have the votes of only qualified persons counted, to the end that his vote may exercise its just effect in proportion to the number of votes cast by qualified persons. *Ladd v. Holmes*, 167.

FREE ELECTIONS.

The meaning of the word "free" in Const. Or., Art. II, § 1, providing that "all elections shall be free and equal;" is that the voter shall not be hindered or prevented from free participation in the election. *Ladd v. Holmes*, 167.

MUTUAL ACCOUNT.

A mutual account is one involving reciprocal demands. *Altree v. Gregson*, 500.

OPEN ACCOUNT.

An open account is one not stated or agreed upon. *Altree v. Gregson*, 500.

PUBLIC IMPORTANCE.

The construction of a will wherein only private persons are interested is not a question of "public importance" as that expression is used in Rule 16 of the supreme court, justifying a hearing out of its regular order. *Booth's Will*, 154.

REASONABLE TIME.

What will be a reasonable time for filing a cost bill in the supreme court cannot be stated accurately, but it may sometimes be that the balance of the term at which the case was decided will not be "a reasonable time" for filing the cost bill, as in this case. *Richardson v. Orth*, 252.

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E. P. L. H.

HARVARD L